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Supreme Court, U.S.
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No. 08-249

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In The

Supreme Court of the United States

ARROW ELECTRONICS, INC.,

Petitioner,

v.

E.ON AG *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Relying on the *Bremen* doctrine (under which an international forum-selection clause is controlling if certain exceptions do not apply), the district court dismissed claims for pollution-related damages at one of California's biggest clean-up sites even though (a) the designated country refuses to enforce foreign forum-selection clauses in litigation over domestic pollution liabilities; (b) American courts have rejected domestic forum-selection clauses in environmental cases because of public interest factors; (c) the ruling is directly contrary to the plain text of the federal superfund statute, which vests U.S. district courts with exclusive jurisdiction over Arrow's federal claims; and (d) the ruling creates a risk of inconsistent judgments, which defeats forum-selection clauses under foreign common-law. The Ninth Circuit affirmed with no independent analysis, thus continuing a well-developed circuit split on how to apply *Bremen*. The questions presented are:

1. Should the *Bremen* doctrine be in line with contemporary domestic and international forum-selection law?

2. Should a *Bremen* dismissal be reviewed *de novo,* as nine circuits do, or using the abuse of discretion standard, as do two (including the Ninth)?

LIST OF PARTIES

Below is a list of the parties to the proceedings in the court whose judgment is sought to be reviewed. Petitioner Arrow Electronics, Inc. ("Arrow") believes that they are all parties before this Court, except for Wyle Laboratories, Inc. ("Wyle"), who was a plaintiff/cross-claimant in the district court and an appellee in the Court of Appeals. Arrow believes that Wyle has no interest in this petition, which focuses on the dismissal of Arrow's claims against E.ON AG ("E.ON") and several of E.ON's subsidiaries.

Arrow Electronics, Inc.
E.ON AG
E.ON North America, Inc.
E.ON U.S. Investments Corporation
Fidelia Corporation
Wyle Laboratories, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Arrow Electronics, Inc. has no parent company and no public company owns 10% or more of its stock.

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OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit is reported at 268 Fed. Appx. 551 (unpublished) and reproduced at pages 1-3 of the appendix to this petition. The opinion of the district court is not reported, but it is reproduced at App. 4-58.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on February 28, 2008, App. 1, and denied a timely petition for rehearing on April 11, 2008, App. 59. On July 3, 2008, Justice Kennedy signed an order extending the time for filing this petition to and including August 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 113(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(b), reads as follows:

> (b) Jurisdiction; venue
>
> Except as provided in subsections (a) and (h) of this section [which are not relevant here], the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without

> regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

STATEMENT OF THE CASE

This lawsuit stems from migrating pollution in Norco, California. For decades, a scientific facility there used toxic chemicals as it tested military and aerospace projects. App. 4-5. Of more than 100 sites supervised by the California Department of Toxic Substance Control ("DTSC"), this one ranks among the top five in terms of "size, complexity, and high levels of community interest." *See* http://www.dtsc.ca.gov/SiteCleanup/HotLocalProjects.cfm (last visited Aug. 21, 2008). The case also involves to a lesser degree a testing facility in Huntsville, Alabama. App. 4.

Two contracts are relevant: (1) the 1994 asset purchase agreement through which Wyle Laboratories, Inc. ("Wyle") bought the scientific testing facilities from a company that E.ON AG ("E.ON") later sold to Arrow Electronics, Inc. ("Arrow"); and (2) the 2000 share purchase agreement between E.ON and Arrow. The first contract ("the 1994 APA") granted Wyle indemnification rights against the seller for pre-closing pollution liabilities. App. 6. It also contained a mandatory forum-selection clause designating venue

in California. App. 6. In the second contract ("the SPA"), E.ON promised to indemnify Arrow for any liabilities of the company it was selling, including specifically liabilities under the 1994 APA. App. 7-8. The SPA also contained a forum-selection clause, which called for settlement of disputes in Germany. App. 9.

After regulatory proceedings were initiated against Arrow and Wyle, Arrow and Wyle sued E.ON in the Central District of California under CERCLA, the California superfund statute, and contract law for declaratory relief, remediation expenses and costs incurred in related mass tort litigation. App. 9-15. Wyle also filed a cross-claim against Arrow under the 1994 APA. App. 2.[1]

E.ON does not dispute the validity of its indemnity promise to Arrow, but refused to pay because it disagrees with the "urgency and scope" of the remediation plan required by California's DTSC. App. 66.[2] E.ON objected to the plan because of its concern "that areas of contamination could be discovered (once buildings are removed) which previously could have

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[1] Actions were filed in both Alabama and California, but the Alabama case later was transferred and consolidated with the California proceedings. App. 12-15. The California district judge then issued a single ruling on both the Alabama and California complaints, which is the subject of this petition. App. 4-58.

[2] E.ON made a single token payment of $250,000, but at the time of judgment the expenses were in the $10 million range and that number has multiplied since then.

naturally degraded over time and this in turn will increase the overall remediation cost." App. 66. E.ON also felt that the plan "does not properly reflect the environmental responsibility under the 1994 Asset Purchase Agreement." App. 65. E.ON's mantra has been: "Any indemnification claim against E.ON must be in line with the provisions of the Share Purchase Agreement between E.ON and Arrow (hereafter "SPA") and the 1994 Asset Purchase Agreement." App. 61.

Although the underlying contract, the 1994 APA, requires resolution of the environmental liabilities in California, E.ON asked the district court to export Arrow's claims to Germany based on the forum-selection clause in the SPA – far from the pollution, witnesses, and state regulators. App. 26.

In opposition, Arrow argued that applying the German forum clause would be unreasonable under the circumstances because it would violate the forum-selection clause in the 1994 APA and create an untenable risk of inconsistent judgments with respect to the DTSC remediation order and Wyle's cross-claim. Arrow cited analogous federal cases that rejected domestic forum-selection clauses – notwithstanding the presumed validity of such clauses under *M/S Bremen v. Zapata Off-Shore Drilling Co.*, 407 U.S. 1 (1972) – because pollution liabilities are inherently local in nature and can impact public health and welfare. *See, e.g., D/H Oil and Gas Co. v. Commerce Industry Ins. Co.*, 2005 WL 1153332 (N.D. Fla. 2005) (citing additional authorities).

Arrow presented a statement from the DTSC explaining that it has supervisory responsibilities even with respect to a private allocation of pollution liabilities. App. 47-48. The DTSC concluded that enforcing the German forum clause here would impede its ability to perform this role and frustrate the strong public policy codified in the California superfund statute. App. 47. Arrow pointed out that the U.S. has exclusive jurisdiction over its CERCLA claims under 42 U.S.C. § 9613(b). App. 29. And, Arrow submitted an unrefuted declaration from a prominent German law professor, Professor Pfeiffer, who attested that, in Germany, a foreign forum clause is void in litigation over domestic pollution. App. 36.[3]

The district court, however, ruled against Arrow in every way. In twin orders, it dismissed Arrow's claims against E.ON based on the German forum-selection clause, but entered summary judgment in favor of Wyle on its cross-claim against Arrow. App. 2-3, 57-58. It also dismissed Wyle's claim against E.ON on standing grounds, thereby releasing E.ON completely from any American adjudication of E.ON's liability for remediation of the serious pollution in California and Alabama. App. 57-58.

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[3] Expressly reserving its right to litigate in the U.S., Arrow also drafted and then, just before the contractual limitations period expired, filed a place-saver lawsuit in Germany. The German action, however, has been stayed.

Although it penned a lengthy opinion on the forum-selection issue, the district court never mentioned the threat of inconsistent judgments. It paid no heed to *D/H Oil* and similar cases, apparently because they involved domestic rather than international forum-selection clauses. The district court found that "the Ninth Circuit recognized this distinction when it explicitly applied *M/S Breman* [sic] rather than *Stewart Organization* [*Inc. v. Ricoh Corp.*, 487 U.S. 22 (1998)] to enforce a forum selection agreement between a [sic] Italian fashion house and its U.S. distributor." App. 28 n.7.

The district court held that the SPA's contractual terms overrode CERCLA's mandatory jurisdiction and special venue provisions by creating a rule out of whole cloth, which is not found in CERCLA's text or anywhere else. Specifically, the district court held that "unless one of the parties is financially incapable of performing its contractual obligations, statutory recovery under CERCLA is foreclosed if the parties' liability has already been apportioned by an indemnity agreement." App 28. Stating that "the DTSC's worries are overstated," the district court substituted its own judgment for the agency California has assigned regulatory authority in this area and concluded that sending California pollution issues to Germany does not affect the DTSC. App. 48. Finally, the district court decided that Arrow's evidence of German forum law is irrelevant:

> Arrow has submitted a declaration from a German law expert stating that "if the

> Huntsville and Norco facilities at issue . . . were [German] domestic sites governed by German law, any agreement selecting the jurisdiction of a foreign country for disputes involving environmental damages related to these sites would be invalid and unenforceable." (Pfeiffer Decl. par 20.) This argument is irrelevant because Norco and Huntsville are not located in Germany.

App. 36.

The Ninth Circuit affirmed with no independent analysis other than a brief discussion of Wyle's future damages. App. 2.[4]

REASONS FOR GRANTING THE WRIT

I. Because of the Importance of Forum-Selection Clauses to American Commerce, *Certiorari* Should Be Granted When, As Shown Here, the *Bremen* Doctrine Needs Refining

The Court issued its *Bremen* decision to overcome the parochial attitude then prevalent among American

[4] Like the district court, Judge Berzon expressed the view at oral argument on Arrow's appeal that the *Bremen* test governs this case but not the other pollution cases cited by Arrow because those involved domestic rather than international forum clauses. *See* www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=3, Case No. 06-56277 (41:57-42:40 [minutes:seconds]).

courts, which were rejecting foreign forum-selection clauses as a matter of course. *See M/S Bremen v. Zapata Off-shore Drilling Co.*, 407 U.S. 1, 9-10 (1972). The Court held that the correct approach is to enforce such a clause unless the resisting party clearly showed "that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15. This rule was necessary to bring America in line with the international community, which recognized the particular need for forum-selection clauses in matters involving world trade and commerce. *Id.* at 11-13.

In the thirty-six years since *Bremen* was decided, however, the pendulum has swung to the opposite extreme. American courts routinely apply the *Bremen* test so rigidly that they fail to recognize exceptions that are now part of the international norm. Further, widespread confusion has resulted from having different standards for domestic and foreign forum clauses. Thus, as it does from time-to-time, the Court should grant *certiorari* to further refine the *Bremen* doctrine in light of contemporary forum-selection law at home and abroad.

A. The Court periodically reviews the *Bremen* doctrine

Two years after deciding *Bremen*, the Court again granted *certiorari* because of the importance of a forum-selection issue in a securities case. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). Observing

that "the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets," the Court followed *Bremen* to enforce an international arbitration clause. *Id.* at 515. The Court noted, however, that future litigation in concrete cases should determine the outcome if contacts with the foreign country were attenuated. *Id.* at 517 n.11.

The Court addressed *Bremen* twice in the 1980's. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). In *Mitsubishi*, the Court applied an international arbitration clause to antitrust claims because of liberal arbitration policies and international comity. 473 U.S. at 625, 629. In *Stewart*, however, the Court took a slightly different approach to a domestic forum clause. It held that *Bremen* was "instructive" when ruling on a transfer motion under 28 U.S.C. § 1404(a), but that in that context there must be a "flexible and individualized" analysis which considers "those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" *Id.* at 28-30.

The Court again refined the *Bremen* analysis in the 1990's. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). In *Carnival*

Cruise, it rejected the notion that "serious inconvenience" excused a cruise passenger from a forum clause because the dispute – over an accident at sea – was not inherently local in nature. 515 U.S. at 594.[5] In *Sky Reefer*, it focused on international law to uphold a foreign arbitration clause in a maritime bill of lading. 515 U.S. at 536-537 (citing the Hague Rules and English case law). But, it also signaled that – where there is no subsequent opportunity for review in the United States – it would condemn international clauses that waive statutory remedies. *Id.* at 540.

More than a decade has passed since the Court last spoke on *Bremen*. As shown below, *certiorari* should be granted now to clarify the unresolved, concrete *Bremen* issues presented here.

B. The time is right for a *Bremen* update because the current test is out-of-line with contemporary international forum-selection law

The *Bremen* decision was meant to bring the American courts in line with the international community. But, the rigid *Bremen* test commonly applied by our lower courts now is out-of-line with international standards. For example, the Hague Convention on Choice of Court Agreements, done June 30, 2005,

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[5] While *Carnival Cruise* involved a domestic clause, the Court applied *Bremen* but not *Stewart* because there was no transfer motion at issue, only a motion to dismiss.

44 I.L.M. 1294 ("the Hague Convention") – and other sources of international law – include exceptions to the general rule that go beyond those described in *Bremen* and its progeny.[6]

Concluded on June 30, 2005, the Hague Convention tracks *Bremen's* general rule: Mandatory international forum-selection clauses are presumptively enforceable in civil cases. App. 71-74. But, it also excludes various types of controversies that would be covered by the general rule in *Bremen*, e.g., claims arising from antitrust, tort, and many intellectual property violations. App. 70.[7]

The Hague Convention further differs from the standard description of the *Bremen* test by using clear disjunctive connectors when listing the "public policy," "unjust," and "unreasonable" exceptions. App. 74. Thus, the structure of the Hague Convention is more compatible with the *Stewart* analysis than a

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[6] The Hague Convention is relatively recent, and the United States has not yet ratified it. But, it is relevant because it resulted from a proposal made by the U.S. Department of State, in consultation with U.S. private and business sectors. *See* Ved P. Nanda, *The Law of Transnational Business Transactions*, § 3:40; *see also* Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 Brook. J. Int'l L. 7, 8 (1998).

[7] The Hague Convention rules do not infringe on this Court's rulings in *Scherck*, *Mitsubishi*, and *Carnival Cruise* because they do not reach arbitration or domestic forum clauses. App. 68, 71.

strict *Bremen* approach. *See* David K. Pansius *et al.*, *Litigation of International Disputes in U.S. Courts*, § 7:21 ("courts might interpret some Convention defenses more broadly than *Bremen's* exceptions").

Article 21(2) of the Hague Convention includes a vital reciprocity provision not found in the *Bremen* doctrine. App. 83. For example, if a country – such as Germany – decides to eschew the treaty's general rule with respect to a specific type of case – such as disputes over domestic pollution liabilities – an international forum-selection clause is not controlling in either that country or in any other. App. 83. This provision is "the bedrock for the entire Convention." William J. Woodward, *Saving the Hague Choice of Court Convention*, 29 U. Pa. J. Int'l L. 657, 712 (2008).

The *Bremen* test (at least as understood by the Ninth Circuit) strays from English common-law as well. Although England traditionally has enforced with vigor international forum-selection clauses, it recognizes an overriding exception not mentioned in *Bremen*. English courts will not enforce a foreign forum clause if to do so will splinter the litigation and thus create a risk of inconsistent judgments. *See Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425, 432-433, 2001 WL 1479758 (House of Lords). As stated by Lord Bingham, who was in the *Donohue* majority:

> [I]n a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which

> is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.

Id. at 436.

Thus, the *Bremen* test in its current formulation is out-of-line with international forum law as embodied in the Hague Convention and English common-law, as well as the German procedural rule explained by Professor Pfeiffer. As in *Sky Reefer*, the Court should assess the current *Bremen* issues in light of these contemporary principles of international forum law.

C. The Ninth Circuit's *Bremen* test directly conflicts with that of the First Circuit, which applies the more flexible *Stewart* analysis

The *Bremen* doctrine is not just out-of-line with foreign forum law. Of equal concern is the discrepancy between *Bremen* and *Stewart*, which governs most domestic forum clauses seen in federal court. Commentators have observed that the differences in these opinions have created widespread confusion.

> Not surprisingly, given this confusion surrounding forum-selection clause analysis, many lower federal courts have failed to

> distinguish between the approach taken in Carnival Cruise and that taken in Stewart. . . . [I]t is not uncommon for many courts not to draw various distinctions between forum selection clauses that should be enforced and those that should not be enforced.

14D Charles Alan Wright, *et al.*, *Federal Practice and Procedure: Jurisdiction* § 3803.1, at 79-98 (3d ed. 2007); *see also* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 Tul. L. Rev. 973, 976 (2008) ("This doctrine in the federal courts is a tangled mess.").

Having two different tests in *Bremen* and *Stewart* has resulted in a pronounced circuit split with respect to international forum-selection clauses. The Ninth Circuit interprets *Bremen* as allowing only three narrowly defined exceptions to the general rule:

> The Supreme Court has identified three grounds for repudiating a forum selection clause: first, if the inclusion of the clause in the agreement was the product of fraud or overreaching; second, if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and third, "if enforcement would contravene a strong public policy of the forum in which suit is brought."

Richards v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998) (en banc); *accord Holland America Line, Inc. v. Wärtsilä North America, Inc.*, 485 F.3d

450, 457 (9th Cir. 2007); *see also Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1292 (11th Cir. 1998) (adopting substantially same standard).

In contrast, the First Circuit applies the more flexible *Stewart* approach even to international forum-selection clauses not governed by 28 U.S.C. § 1404(a):

> [In *Stewart*] the Supreme Court required that the district court consider "factors other than those that bear solely on the parties' private ordering of their affairs. . . . The *Stewart* case, therefore, teaches that, after considering and balancing all of the private and public interest factors, a district court in a particular case may "in the interest of justice" still "refuse to transfer a case notwithstanding the counterweight of a forum-selection clause. . . . "
>
> In this case, since we are dealing with a forum-selection clause that refers to a forum outside of the United States, and not within the scope of the statute, section 1404(a) does not apply. Nonetheless, even though a foreign jurisdiction was chosen by the parties, that fact should not preclude the application of the sound principles of *forum non conveniens* enunciated in *Stewart* and similar cases.

Royal Bed and Spring Co. v. Famossul Industria E Comercio de Moveis Ltda., 906 F.2d 45, 51 (1st Cir. 1990).

This circuit split is most significant here because courts that apply the *Stewart*-type analysis to

forum-selection clauses in pollution litigation have refused to enforce them – a result at odds with the ruling below. These cases find that the public interest factors allowed by *Stewart* outweigh a contractual choice-of-forum in this context. In particular, they note that pollution is inherently local. The state owns the groundwater. The remediation is subject to the jurisdiction of state environmental regulators. The question of who pays for the clean-up can impact the health and welfare of citizens other than the private litigants. *See D/H Oil and Gas*, 2005 WL 1153332 at *4-8; *see also Seneca Ins. Co. v. Henrietta Oil Co.*, 2003 WL 255317 (S.D.N.Y. 2003); *Keweenaw Konvenience, Inc. v. Commerce & Industry Ins. Co.*, 2001 WL 34070116 (W.D. Mich. 2001).

Certiorari, therefore, is warranted to dispel the confusion over whether the *Bremen* doctrine should be in line with the domestic forum-selection analysis described in *Stewart*.

D. The Circuits are split on the standard of review for a *Bremen* dismissal

When reviewing a dismissal based on an international forum-selection clause, the Eighth and Ninth Circuits defer to the district court unless an abuse of discretion is shown.[8] In contrast, nine other circuits

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[8] *See Holland America*, 485 F.3d at 455; *Servewell Plumbing, LLC v. Fed. Ins. Co.*, 439 F.3d 786, 788 (8th Cir. 2006).

review *de novo* the enforcement of an international forum-selection clause.[9] *De novo* review is more appropriate because such decisions "require a complex analysis of fundamental fairness and public policy [cit. omitted] – determinations that are quintessentially legal." *Lipcon*, 148 F.3d at 1290.

Considering the importance of forum-selection clauses to American and international commerce, the Court should exercise its supervisory powers to establish uniformity with respect to this procedural issue. *Certiorari* should be granted to resolve the conflict over the standard of review for a *Bremen* dismissal.

II. This Case Is a Good Vehicle for Reviewing the *Bremen* Doctrine

This case not only presents ripe *Bremen* issues, it is a particularly good vehicle for review because (1) the issues were squarely addressed below; (2) a

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[9] *See Lambert v. Kysar*, 983 F.2d 1110, 1112 (1st Cir. 1993); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007); *Instrumentation Associates, Inc. v. Madsen Electronics (Canada) Ltd.*, 859 F.2d 4, 5 (3d Cir. 1988); *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 209 (4th Cir. 2007); *Calix-Chacon v. Global Int'l Marine, Inc.*, 493 F.3d 507, 510 (5th Cir. 2007); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 721 (6th Cir. 2006); *Kochert v. Adagen Medical Int'l., Inc.*, 491 F.3d 674, 677 (7th Cir. 2007); *American Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 925 (10th Cir. 2005); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998).

significant public interest is involved; (3) the well-developed record provides a concrete context; and (4) the outcome is wrong.

A. The issues were squarely addressed below

Arrow argued below that the public interest factors of the *Stewart* analysis should be considered when determining whether the German forum clause governs its environmental claims against E.ON. It showed that *Bremen's* comity concerns are inapplicable here because the clause would be unenforceable in Germany under a reverse mirror analysis. It stressed that enforcing the German clause is unreasonable under the circumstances because its claims against E.ON are inextricably intertwined with third-party interests – the DTSC must monitor private allocations of pollution liabilities to ensure adequate funding for significant clean-ups, and the 1994 APA, the subject of Wyle's cross-claim against Arrow, is central to E.ON's defense. The district court squarely (and wrongly) ruled on all these points:

> Arrow maintains that *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), rather than *M/S Bremen*, governs forum analysis here. *Stewart* is inapposite because it addressed forum non conveniens in a domestic controversy, rather than a motion to dismiss for improper forum in an international dispute.
>
> . . .

> Arrow contends that German law disfavors the enforcement of forum selection clauses in environmental disputes. Arrow has submitted a declaration from a German law expert stating that "if the Huntsville and Norco facilities at issue . . . were [German] domestic sites governed by German law, any agreement selecting the jurisdiction of a foreign country for disputes involving environmental damages related to these sites would be invalid and unenforceable." (Pfeiffer Decl. ¶ 20.) This argument is irrelevant because Norco and Huntsville are not located in Germany.
>
> . . .
>
> Arrow further advocates that a forum selection agreement is unenforceable where the interests of third parties, including the [mass tort] plaintiffs and state environmental regulators, are "inextricably intertwined" with E.ON's alleged obligation to Arrow. . . . To the extent that third parties have an indirect interest in the E.ON-Arrow dispute because E.ON is Arrow's indemnitor, the argument merely restates the public policy argument already discussed and rejected above.

App. 28, 36, 43-44.

E.ON informed the Ninth Circuit that "the law in this Circuit is well-settled that a district court's order dismissing a case for improper venue due to a forum selection clause is reviewed for abuse of discretion." Brief of Appellees E.ON AG *et al.* at 17. Although the

memorandum decision does not expressly state any standard of review, just months earlier a Ninth Circuit panel that included one of the judges below reiterated the abuse of discretion standard for this issue. *See Holland America*, 485 F.3d at 455. The one-sentence affirmance in this case shows that the Ninth Circuit followed its usual rule here. App. 2.

B. This case raises issues of significant public interest

Forum-selection issues are important, as shown by the Court's continuing refinement of the *Bremen* doctrine. And, they are particularly important here because of the presence of two public interest factors.

The State of California has a very strong public interest in overseeing who pays for environmental remediation. Of all the polluted sites in California, the Wyle site is one of the hottest. *See* www.dtsc.ca.gov/SiteCleanup/HotLocalProjects.cfm (last visited Aug. 21, 2008). The agency charged with supervising the clean-up of the pollution – which has migrated to neighboring residential areas – voiced its strong opposition to enforcement of the German forum clause. App. 47-48. The California superfund statute requires the DTSC to monitor private litigation over clean-up responsibilities even if it is not a party to the action. Cal. Health & Safety Code § 25363(e). As noted by the California Supreme Court, "'[i]t is difficult to imagine any interest that [a legislative entity] could have that would be more compelling . . .

than its interest in determining the availability of funds for the cleanup of hazardous substances located within its boundaries.'" *Conn. Indemn. v. Sup. Ct.*, 23 Cal. 4th 807, 815 (2000) (bracketed language supplied by court); *accord Ford Motor Co. v. Ins. Co. of N. Am.*, 35 Cal. App. 4th 604, 613-14 (Cal. App. 1995).

Also at stake is the public's interest in sound judicial administration. E.ON has made clear that the core dispute is not over the terms of its contract with Arrow, but the reasonableness of the remediation plan required by the DTSC and the scope of the environmental liabilities under the 1994 APA – the contract with Wyle. App. 61-67. There can be no doubt that the splintering of this litigation – sending Arrow's claims to Germany while the administrative and Wyle actions continue in California – multiplies proceedings and creates a risk of inconsistent judgments. Moreover, enforcing the German forum clause exports federal and state superfund issues with no opportunity for subsequent review in the U.S. Thus, the ruling below subverts the public interest in "systemic integrity and fairness."

C. The well-developed record provides a concrete context for review

In *Scherk*, the Court recognized that refinement of the *Bremen* doctrine should occur in a concrete context. This case satisfies that requirement because the issues are framed by a well-developed record. Arrow's opposition to E.ON's motion to dismiss did

not rest on the pleadings alone. It pointed to declarations and depositions establishing E.ON's direct and active participation in the California pollution liabilities of its American subsidiary. App. 7, 41-42, 55. It provided correspondence and other documents from E.ON showing that E.ON, while acknowledging its indemnity obligation, refuses to pay based on inherently local fact issues relating to the reasonableness of the remediation. App. 65-67. It submitted a statement from the California DTSC opposing enforcement of the German forum clause for practical as well as policy reasons. App. 47-48. It cited deposition testimony showing that the federal Environmental Protection Agency also monitors private litigation over pollution liabilities. It presented the unrefuted declaration of a prominent German law expert to show that international comity concerns do not support E.ON's position. App. 36. This and other evidence in the record provides a concrete basis for resolving the important, unresolved *Bremen* issues presented by this petition.

D. The decision below is wrong

The courts below erred by refusing to consider the unrefuted evidence that Germany will not enforce a foreign forum clause in litigation over domestic pollution liabilities. The holdings in *Bremen*, *Scherk*, and *Sky Reefer* (among others) were driven by international comity concerns. But, those concerns are not present here. The ruling below not only is out-of-line with German forum law, it conflicts with the

reciprocity principle that is the bedrock of the Hague Convention. By straying from generally accepted international principles, the decision in this case undermines a key objective of the *Bremen* doctrine.

The courts below should have held that the general *Bremen* rule does not apply here because (as Germany recognizes) environmental remediation is an inherently local issue – unlike the barge towage in *Bremen*, the European markets in *Scherk*, the automobile marketing in *Mitsubishi*, the maritime accident in *Carnival Cruise*, or the bill of lading in *Sky Reefer*. The public owns the groundwater that has been contaminated by the Wyle facilities. And, public health issues are prominent in the related toxic tort cases that are part of this dispute. The Court's *Bremen* and *Carnival Cruise* decisions left the door open for striking down a forum clause that would force inherently domestic issues to be resolved in a remote, alien forum. *See Bremen*, 407 U.S. at 17; *Carnival Cruise,* 499 U.S. at 94.

The district court had no basis for marginalizing the DTSC's interest in this case. The views of this agency are entitled to at least some deference. *Cf. United States v. Mead Corp.*, 533 U.S. 218 (2001). Further, other courts have found that state regulators have an interest in who pays for remediation even when litigation over contractual indemnities does not involve any superfund claims. *See Ford*, 35 Cal. App. 4th at 613-614; *D/H Oil*, 2005 WL 1153332 at *3-7.

As the California courts have found, California has perhaps no more compelling interest than "its

interest in determining the availability of funds for the cleanup of hazardous substances located within its boundaries." *Conn. Indemn.*, 23 Cal. 4th at 815. This compelling public interest renders the forum-selection clause unreasonable here. *See also D/H Oil*, 2005 WL 1153332; *Seneca*, 2003 WL 255317. Indeed, the *Seneca* court rejected a domestic forum clause based on a straight *Bremen* analysis.

The courts below created a novel and unworkable rule when they held that "unless one of the parties is financially incapable of performing its contractual obligations, statutory recovery under CERCLA is foreclosed if the parties' liability has already been apportioned by an indemnity agreement." App. 28. This cannot be reconciled with CERCLA, which expressly allows contractual indemnities, or with case law from other circuits. *See* 42 U.S.C. § 9607(e); *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 324-26 (7th Cir. 1994) (holding that the plaintiff was entitled to both contractual remedies and declaratory and compensatory relief under CERCLA because the contract allocated clean-up costs to the defendant). There is no basis for holding that U.S. district courts lack jurisdiction over properly-pled CERCLA claims if the plaintiff has a contractual indemnity in its favor.[10]

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[10] In the alternative, the district court held that a waiver clause in the SPA barred Arrow's CERCLA claim. The CERCLA ruling, of course, does not reach the fundamental flaws in the dismissal of Arrow's contract claims. In any event, the contract

(Continued on following page)

Finally, as the English House of Lords held in *Donohue*, a foreign forum clause is manifestly unreasonable if it creates a risk of inconsistent judgments. *See also Frigate Ltd. v. Damia*, 2007 WL 1279963 *3 (N.D. Cal. 2007). Enforcing the German forum clause under the circumstances of this case conflicts not only with *Donohue*, but also with the unassailable mandate in *Stewart* that says a district court "must weigh in the balance those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" *See Stewart*, 487 U.S. at 30.

The Ninth Circuit's abuse of discretion standard compounded the district court's errors, effectively denying meaningful review. The important public interest and international policy concerns that predominate here warrant *de novo* consideration by a higher court. *See Lipcon*, 148 F.3d at 1290. *See also* Sup. Ct. R. 10(a) (noting Court's supervisory power).

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on its face preserved rather than waived E.ON's CERCLA liabilities. As the district court correctly found, the SPA allocated all CERCLA liability to E.ON. *See, e.g.*, App. 40-42; *see also White Consol. Indus., Inc. v. Westinghouse Elec. Corp.*, 179 F.3d 403, 409 (6th Cir. 1999) ("Generally, parties may contract to shift CERCLA and other environmental liabilities by means of an assumption or indemnification agreement"). Moreover, it is well established that CERCLA does not allow contractual defenses raised by a party such as E.ON who has assumed all CERCLA liability, *see Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1303-04 (11th Cir. 2002), and neither E.ON nor the court below cited any authority holding otherwise.

CONCLUSION

Bremen's central premise is not at issue. Forum-selection clauses play an important role in commerce and must be enforced as a general rule. The problem is not with the general rule, but with having different tests for assessing the exceptions. Currently there is conflict and confusion among the lower courts on how to apply and review the *Bremen* test. And, as shown below, results are being reached that are out-of-line with international forum-selection law. The Court, therefore, should grant this petition to clarify these issues.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARROW ELECTRONICS, INC., Plaintiff-Appellant, v. E.ON AG, Defendant-Appellee, and WYLE LABORATORIES, INC., Cross-Claimaint [sic]-Appellee, v. ARROW ELECTRONICS, INC., Cross-Defendant-Appellant.	Nos. 06-56277, 06-56315 D.C. No. CV-05-02388-SVW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

(Filed Feb. 28, 2008)

Argued and Submitted February 5, 2008
Pasadena, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: GRABER and BERZON, Circuit Judges, and WILKEN,** District Judge.

Arrow Electronics appeals the following decisions of the district court: (1) the dismissal of Arrow's claims against E.ON AG; (2) summary judgment against Arrow on Wyle Labs' cross-claim; and (3) the district court's declaration that Arrow must pay all of the past and future reasonable fees and costs associated with Wyle Labs' defense in two state court toxic tort actions. We have jurisdiction pursuant to 28 U.S.C. §§ 1291, 1331 and 1367. Except as noted below, we affirm the district court's orders for the reasons relied upon by the district court in its comprehensive opinions.

With respect to Arrow's obligation to indemnify Wyle Labs for its defense costs, the district court was entitled to find that past reasonable defense costs all fell within the scope of the parties' indemnity agreement or, in the alternative, that it would be impossible to apportion past defense costs between those that fall within the scope of the indemnity agreement and those that do not. The district court did not err in ordering Arrow to defend Wyle Labs in the pending state court lawsuits. However, the district court erred in finding that Arrow would ultimately be liable for all of Wyle Labs' future reasonable defense costs.

** The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

Whether these costs are covered by the indemnity agreement and thus may be awarded as damages on Wyle Labs' indemnity claim involves open issues of fact. It is not clear that future defense costs will all fall within the scope of the parties' indemnity agreement or, if they do not, will not be capable of apportionment between covered and uncovered costs. Therefore, the claim for future defense costs is not yet ripe for determination.

For this reason, we vacate the portion of the district court's order requiring Arrow to indemnify Wyle Labs for all of its future defense costs and we remand the case to the district court for further proceedings consistent with this disposition. The district court may stay the proceedings in this case pending a resolution of the tort actions or may adopt another procedure for review of Arrow's ultimate liability for future reasonable defense costs incurred by Wyle Labs.

AFFIRMED in part, VACATED AND REMANDED in part. The parties shall bear their own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARROW ELECTRONICS, INC. AND WYLE LABORATORIES, INC. Plaintiffs, v. E.ON AG, Defendant.	CV 05-2388 SVW (SSx) Consolidated with CV 05-5154 SVW (SSx) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS; AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION. [CV 05-2388: 16, 30, 27] [CV 05-5154: 41] (Filed Aug. 4, 2006)

I. INTRODUCTION

The consolidated actions before the Court involve the apportionment of environmental liability among Plaintiff Arrow Electronics, Inc. ("Arrow"), Plaintiff Wyle Laboratories, Inc. ("Wyle Labs"), and Defendant E.ON AG ("E.ON"). The two actions are *Arrow v. E.ON AG et al.*, CV 05-5154 ("Alabama case"), and *Arrow et al. v. E.ON AG,* CV 05-2388 ("California case"). They arise from contamination at a pair of military and aerospace testing sites located in Norco, California and Huntsville, Alabama. There are three pending motions in the consolidated actions: E.ON's

motion to dismiss against Arrow in the California Case, E.ON's motion for judgment on the pleadings against Wyle Labs in the California Case, and Arrow's motion for reconsideration in the Alabama Case.

For reasons discussed below, the Court GRANTS E.ON's Motion to Dismiss against Arrow and E.ON's Motion for Judgment on the Pleadings against Wyle Labs. The Court DENIES Arrow's Motion for Reconsideration.

II. BACKGROUND

This case involves questions of contractual indemnity and successor liability following a complex chain of corporate transactions.

A. Corporate Genealogy

In 1949, Frank Wyle founded Wyle Laboratories. The company developed two lines of business: (1) scientific testing, which was conducted at sites in Norco and Huntsville, and (2) electronics distribution. The electronics business became the company's mainstay. In 1994, Wyle Laboratories spun off its scientific testing business and the "Wyle Laboratories" corporate name. Thereafter the scientific testing business carried on as Wyle Laboratories, Inc., one of the parties to this action. The electronics business continued to operate independently, under the name Wyle Electronics. For simplicity, the Court refers to

the seller of the scientific testing business as "Wyle Electronics," and the buyer as "Wyle Labs."

In 1994 Wyle Electronics transferred certain assets, including the Norco and Huntsville sites, to Wyle Labs through an Asset Purchase Agreement. (California Compl. ¶¶ 16, 17; *see* Marks Decl. Ex. B.)[1] The Asset Purchase Agreement contains an indemnity provision. Section 10.4(a) provides that Wyle Electronics shall indemnify Wyle Labs with respect to "any liability or obligation arising out of CERCLA, any equivalent state statute or any other Environmental Law, except to the extent that such liability or obligation is caused primarily by actions or events occurring at a facility after the closing date. . . . " (Marks Decl. Ex. B at 75.) Section 11.4 states that the Asset Purchase Agreement "shall be construed, interpreted, and the rights of the parties determined in accordance with the laws of the State of California. . . . " Section 11.13 further provides that Wyle Electronics and Wyle Labs "irrevocably and unconditionally" agree that any legal proceeding "arising out of this Agreement" must be brought in California. (*Id.* at 88.) Section 11.2 binds the parties' successors and assigns to the terms of the Asset Purchase Agreement. (*Id.* at 84.)

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[1] The Court will refer to the plaintiff's pleading in the Alabama case as the "Alabama complaint," and that of the California case as the "California complaint."

In 1997, VEBA AG, a German conglomerate, acquired Wyle Electronics through a tender offer. The tender offer agreement contains a California forum selection clause. (*See* Corteau Decl. Ex. C.) In 1998, VEBA AG transferred ownership of Wyle Electronics to its American subsidiary, VEBA Electronics LLC ("VEBA Electronics").

Between 1997 and 2000, VEBA Electronics allegedly undertook environmental investigations at the Norco site. Since Wyle Labs rather than VEBA Electronics owned and operated the Norco site during that period, the investigations were apparently conducted in connection with VEBA Electronics's environmental indemnity obligation, as the successor to Wyle Electronics, to Wyle Labs. It has been alleged in third party litigation that VEBA Electronics concealed the results of the investigation from the public. (California Compl. ¶ 45.)

In August 2000, Arrow acquired Wyle Electronics from E.ON, the successor to VEBA AG. The transaction was consummated through a Share Purchase Agreement. "Arrow bought all of the stock of EBV Electronics, Inc., the VEBA holding company that owned all of the stock of Wyle Electronics. After the transfer of the stock to Arrow, Wyle Electronics merged into Arrow on February 8, 2001." (Alabama Compl. ¶ 22.) The Share Purchase Agreement was executed by Arrow, VEBA Electronics, and E.ON. Section 7.10(b) of the Share Purchase Agreement provides that the seller will indemnify Arrow for "any losses, liabilities, damages, costs and expenses

(including any claim for taxation) whether current or contingent, which related to the disposal of any business . . . which business does not relate to the distribution of electronic systems or electronic components." (Fischer Decl. Ex. A at 77.) In Arrow's view, this obligates E.ON to take responsibility for any indemnification claims Wyle Labs makes against Wyle Electronics pursuant to the divestiture of the scientific testing business in 1994. Although VEBA Electronics was the seller, E.ON agreed to be jointly and severally liable for the seller's contractual obligations in section 11.2 of the Share Purchase Agreement. (Fischer Decl. Ex. A at 117.)

Contractual indemnity did not come without cost. Section 3.5 of the Share Purchase Agreement provides: "The Parties agree that the rights and remedies which the Sellers on the one hand and Purchasers . . . on the other hand may have in respect of the breach of a representation, warranty, covenant or agreement contained in this agreement are limited to the rights and remedies explicitly contained herein . . . " (Fischer Decl. Ex. A at 95). Further,

> Purchasers . . . and Sellers hereby waive any and all rights and remedies of any nature (contractual, quasi-contractual, tort or otherwise), including any claims under statutory representations and claims for negligent representation, which they may otherwise have against each other in connection with this Agreement or the transactions contemplated hereby. . . .

(*Id.*) The waiver is "without prejudice to any claim for specific performance or for any injunction or court order to enforce any rights set forth in this Agreement." (*Id.*)

Notably, the Share Purchase Agreement requires the parties to pursue their contractual remedies in Germany. Section 11.10 sets forth mandatory choice of law and forum selection provisions: "This Agreement shall be governed by, and construed in accordance with, the law of Germany. Any dispute arising out of or relating to this Agreement, or the breach, termination, or invalidity thereof, shall be settled in the courts of Frankfurt am Main, Germany, which shall have exclusive jurisdiction." (*Id.* at 122.)

After the transaction closed, Wyle Electronics was merged into Arrow in 2001 and ceased to exist as a separate entity. (Alabama Compl. ¶ 22.) In 2002, Wyle Labs sold the Norco facility to a third party developer. None of the parties in this action currently owns or operates the Norco site.

B. The Alabama Case

Starting in the 1960s, Wyle Electronics' Norco and Huntsville facilities permitted trichloroehylene ("TCE"), tetrachloroethane ("PCE") and other chemicals to drain into the ground, and continued to do so for approximately twenty years. (Alabama Compl. ¶¶ 27-28.) The Alabama Department of Environmental Management ("ADEM") and the California Department of Toxic Substance Control ("DTSC")

have ordered investigation of and remediation at both sites. (*See* Weir Decl. Ex. A at 12-18.) In October 2003, the DTSC entered into a consent order with Wyle Labs and Arrow. The order described Arrow as the "successor-in-interest to Wyle Electronics." (Mann Decl. Ex. B at 31.) Arrow claims it had incurred more than $2,861,087.11 in expenses in these and other regulatory proceedings. Arrow requested reimbursement from E.ON pursuant to the 2000 Share Purchase Agreement. (Weir Decl. Ex. A. at 19-20.) E.ON paid $250,000 in December 2003, but declined to make further payments. (*Id.*)

On September 23, 2004, Arrow brought suit against E.ON and Wyle Labs in the United States District Court for the Northern District of Alabama. Arrow initially asserted eight causes of action against E.ON:

- Environmental cost recovery pursuant to the Share Purchase Agreement, which is alleged to be an enforceable indemnity agreement under sections 107(a) and 107(e) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a) and 9607(e);
- Contribution under CERCLA Section 113(f), 42 U.S.C. § 9613(f);
- Unjust enrichment and restitution;

- Contribution pursuant to the indemnity agreement under the California Hazardous Substance Accounts Act ("HSAA"), Cal. Health & Safety Code § 25363;
- promissory estoppel;
- Breach of contract;
- Declaratory judgment that E.ON is responsible for tax liabilities and environmental pollution at the Norco and Huntsville sites; and
- Reimbursement for unpaid taxes of Wyle Electronics during E.ON's period of ownership.

Although Wyle Labs was also named a defendant, it was not mentioned in the body of the complaint.

In November 2004, Arrow requested leave to file an amended complaint, which would have added a ninth cause of action against Wyle Labs. The proposed new claim sought declaratory judgment of Wyle Labs' rights under the 1994 Asset Purchase Agreement. On December 14, 2004, Arrow and Wyle Labs jointly moved to realign Wyle Labs as a plaintiff. They also applied for leave to file a second amended complaint, which would differ from the original complaint in two respects. First, it restated the ninth cause of action as one for global declaratory judgment of the parties' rights and obligations under the Asset Purchase Agreement, the Share Purchase Agreement, and CERCLA. (*See* Sabovich Decl. Ex. D. ¶ 104-05.) Second, it added an allegation that E.ON breached

warranties contained in the 2000 SPA by failing to purchase all Wyle Electronics shares in the 1997 tender offer. (*Id.* ¶ 60.) Arrow allegedly had to buy out outstanding Wyle Electronics shareholders with its own funds. (*Id.*)

On December 14, the same day Arrow lodged the proposed second amended complaint, E.ON moved to dismiss the case. (Fischer Decl. Ex. B.) On April 6, 2005, before the Alabama court ruled on the motion to dismiss or the motion to amend, Arrow and Wyle Labs moved to transfer the Alabama case to this Court for consolidation with the California case. In support of the motion, Arrow and Wyle Labs argued that E.ON was bound by the California forum selection clauses in the 1994 Asset Purchase Agreement and the 1997 tender offer agreement. (Sabovich Decl. Ex. C at 165-67.)

On May 18, 2005, the Alabama court issued a memorandum order dismissing all of Arrow's claims against E.ON on the ground of improper forum. Order Granting Motion to Dismiss and Memorandum of Opinion, *Arrow Electronics v. E.ON AG*, CV-04-HA-2796-S (N.D. Ala. May 18, 2005). The court found that all the environmental indemnity claims fell within the boundaries of the Share Purchase Agreement's forum selection clause. The order stated:

> The claims of the plaintiff Arrow Electronics, Inc., asserted in the Complaint (doc. 1) in this action against the defendants E.ON AG [and its corporate affiliates] are dismissed with prejudice as to Arrow's right to file in

> any forum except the courts of Frankfort [sic] am Main, Germany, and dismissed without prejudice as the Arrow's rights assert its claims in the courts of Frankfort [sic] am Main, Germany.

(*Id.* at 1.) The court did not rule on Arrow's request for leave to file the first or the second amended complaint, or on Wyle Labs' request to be realigned as a plaintiff.

Two days later, on May 20, the court issued an order granting Arrow's request to transfer the case to California. Order Transferring Case, *Arrow Electronics v. E.ON AG,* CV-04-HA-2796-S (N.D. Ala. May 20, 2005). The transfer order referred to Wyle Labs as "the only defendant remaining in this action," and noted that Wyle Labs had not objected to the transfer. Thus, what remained after E.ON's dismissal was Arrow's claim against Wyle Labs, notwithstanding the request to realign Wyle Labs as a plaintiff. On July 15, 2005, that remaining claim was transferred to this Court.

Meanwhile, on June 29, 2005, Arrow petitioned the Eleventh Circuit Court of Appeals for relief from the Alabama dismissal order. (Corteau Decl. Ex. A at 38.) Arrow requested a writ of mandamus to vacate the order, deny E.ON's motion to dismiss, grant the motion to file the second amended complaint, and transfer the entire case to this Court. *See* Brief of Arrow Electronics, *Arrow Electronics, Inc. v. E.ON AG,* No. 05-14428-J (11th Cir. Aug. 15, 2005). On October 6, 2005, Arrow's petition was dismissed for

lack of appellate jurisdiction. The Eleventh Circuit held that "[t]he district court's May 18, 2005 order dismissing the complaint against the E.ON defendants, and the May 20, 2005, order transferring the case to the United States District Court for the Central District of California, Western Division are neither final nor immediately appealable" under 28 U.S.C. § 1291. *Arrow Electronics, Inc. v. E.ON AG*, NO. 05-13668-JJ (11th Cir. Oct. 6, 2005).

On October 12, 2005, Arrow flied a motion in this Court to reconsider the Alabama court's dismissal order.

C. The California Case

On January 20, 2005, over ninety individual plaintiffs filed suit against Wyle Labs, Arrow, E.ON, and others in Riverside County Superior Court in California ("the Austin case").[2] The Austin plaintiffs seek recovery for personal injury and property damage caused by contamination at the Norco facility. Faced with potential liability, Arrow and Wyle Labs initiated suit against E.ON in this Court on March 20, 2005. Arrow and Wyle Labs seek indemnification from E.ON for their Austin exposure. Specifically, the causes of action are:

[2] Austin is the name of the first plaintiff listed in the complaint.

- Contribution under CERCLA section 107(a), 42 U.S.C. 9607(a);
- Indemnity and contribution under the HSAA, California Health & Safety Code § 25363;
- Equitable indemnity under California common law;
- Breach of contract;
- Global declaratory judgment to set forth rights and obligations of parties under the 1994 Asset Purchase Agreement, the 2000 Share Purchase Agreement, and CERCLA;
- Injunction to clean up the Norco site under California Business & Professions Code § 7203.

A demand for jury trial has been made. E.ON now moves for dismissal of Arrow's claims and judgment on the pleadings against Wyle Labs.

III. PROCEDURAL STANDARDS FOR THE MOTION TO DISMISS

E.ON seeks dismissal of Arrow's claims under Federal Rules Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6). Rule 12(b)(2) permits a party to file a motion to dismiss for lack of personal jurisdiction. To survive a Rule 12(b)(2) motion, a plaintiff need only make a prima facie showing of personal jurisdiction over the defendant. Although the trial court may consider

affidavits and testimony outside of the pleadings, "uncontroverted allegations in [Plaintiff's] complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in [Plaintiff's] favor." *Rio Props., Inc. v. Rio Int'l Interlink,* 284 F.3d 1007, 1019 (9th Cir. 2002).

Rule 12(b)(3) provides for dismissal for improper forum. In considering a 12(b)(3) motion, the trial court need not accept the pleadings as true, and may consider facts outside of the pleadings. *Murphy v. Shneider Nat'l, Inc.,* 362 F.3d 1133, 1137 (9th Cir. 2004). The court "must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party." *Id.* at 1138.

Rule 12(b)(6) allows dismissal for failure to state a claim for which relief can be granted. In considering a 12(b)(6) motion to dismiss, the Court must accept as true all factual allegations of the non-moving party, and should grant dismissal only if the non-moving party can prove no set of facts to support his claim. *W. Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Generally, the trial court may not consider facts outside of the pleadings to decide a 12(b)(6) motion. *Id.* However, a court may take into account documents referenced in the complaint if they have been submitted into the record and the parties do not dispute their authenticity. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).

IV. PERSONAL JURISDICTION

As a threshold matter, the Court must address E.ON's claim that dismissal is warranted for lack of personal jurisdiction. A court's exercise of personal jurisdiction must be authorized under the forum state's long-arm jurisdictional statute and comport with constitutional due process. *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974). Because California authorizes jurisdiction to the full extent of the Constitution, the inquiry in this case is simply whether the exercise of personal jurisdiction would be consistent with constitutional due process. *See* Cal. Code Civ. Proc. § 410.10 (2002); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1317 n.2 (9th Cir. 1998). In the Ninth Circuit, a court may exercise personal jurisdiction where (1) a nonresident defendant purposefully avails itself of the privilege of conducting activities in the forum state, or performs some act invoking the protections of its laws; (2) the plaintiff's claims arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction is reasonable in that it comports with fair play and substantial justice. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (en banc).

In the instant case, E.ON[3] purposefully availed itself of the benefits and protection of California law

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[3] It was actually VEBA AG, E.ON's corporate predecessor, that made the tender offer. For convenience, the Court will use "E.ON" to refer to both the eponymous company and its corporate predecessors.

when it made a tender offer in 1997 for Wyle Electronics, a California corporation with its business address in Irvine, California. (*See* Corteau Decl. Ex. C.) The tender offer statement contained a California choice-of-law and forum selection clause. Moreover, Arrow's claims result from the 1997 tender offer for Wyle Electronics. The Ninth Circuit applies a broad "but for" test for determining whether a claim arises from the defendant's forum contacts. *Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001). Arrow could not have purchased Wyle Electronics from E.ON but for the tender offer of 1997. The Court also notes that E.ON's subsidiary allegedly undertook environmental investigations at the Norco site from 1997-2000, which may subject E.ON to CERCLA liability.

The last prong of specific jurisdiction analysis is reasonableness. If the purposeful availment and relatedness prongs are satisfied, personal jurisdiction is presumed to be reasonable unless the defendant "present[s] a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Ballard v. Savage,* 65 F.3d 1495, 1500 (9th Cir. 1995) (citation omitted). E.ON has not made such a showing; exercising personal jurisdiction over contract claims that arise from E.ON's purchase and sale of a California business hardly seems unreasonable.

The Court accordingly finds that Arrow has made a prima facie case that E.ON had sufficient contacts with California to be subject to personal jurisdiction in this action.

V. CERCLA

The Court must next decide whether to dismiss Arrow's CERCLA claims, which lie at the heart of the consolidated actions.

A. The Statutory Scheme

CERCLA section 107 makes potentially responsible parties ("PRPs") jointly and severally liable to the government for the cost of cleaning up contaminated sites. A PRP may be an "owner of a facility where waste was dumped, an operator of a facility, an 'arranger' of the disposal or treatment of hazardous waste at a facility, or an acceptor of waste for transportation or disposal." *Blasland, Bouck & Lee, Inc. v. City of North Miami,* 283 F.3d 1286, 1302 (11th Cir. 2002); 42 U.S.C. § 9607(a). If a PRP has paid more than its fair share of cleanup costs, it may file a statutory contribution action against other PRPs. As section 113(f) provides, "[a]ny person may seek contribution from any other person who is liable or potentially liable under [section 107(a)], during or following any civil action. . . . " 42 U.S.C. § 9613(f). Thus, CERCLA permits a PRP to recover from another PRP even if no indemnification agreement exists between the two. *Horsehead Indus. v. Paramount Commc'ns,* 258 F.3d 132, 135 (3d Cir. 2001). Unlike the joint and several liability all PRPs owe to the government, a PRP may make only a claim of contribution against another PRP. *Pinal Creek Group v. Newmont Mining Corp.,* 118 F.3d 1298, 1301 (9th

Cir. 1997). In a contribution action, a court apportions liability "using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1); *Western Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 693 (9th Cir. 2004).[4]

In addition to the statutory contribution remedy, Section 107(e) expressly permits PRPs to enter into private indemnification agreements to allocate their CERCLA liability. "Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e)(1). "Where such an indemnity agreement was entered into, contractual and statutory liability for remediation coexist." *Horsehead,* 258 F.3d at 135. Importantly, contractual apportionment of liability analytically precedes a claim for statutory contribution. In *Horsehead,* the defendant had prevailed in a state court action to enforce an environmental indemnity agreement against the plaintiff. In response, the plaintiff filed a CERCLA contribution action in federal court. The Third Circuit affirmed the trial court's grant of summary judgment against the plaintiff, finding that its statutory claim was precluded by the earlier state court judgment on contractual indemnity. In other

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[4] Although sections 107(a) and 113(f) may appear to constitute separate sources of contribution liability, they are read to provide a single framework for contribution claims between PRPs. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-02 (9th Cir. 1997).

words, where an indemnification agreement exists, the apportionment of liability is determined under the terms of the agreement rather than under statutory contribution rules. *See Jones-Hamilton v. Beazer Materials & Servs.*, 973 F.2d 688, 691 (9th Cir. 1992) (holding that indemnity agreement barred statutory contribution claim); *Mardan Corp. v. C.G.C. Music, Inc.*, 804 F.2d 1454, 1460-63 (9th Cir. 1986) (holding that plaintiff's CERCLA claim was foreclosed by a general release agreement with the defendant); *White Consol. Indus., Inc. v. Westinghouse Elec. Corp.*, 179 F.3d 403, 409 (6th Cir. 1999) ("Generally, parties may contract to shift CERCLA and other environmental liabilities by means of an assumption or indemnification agreement."); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir. 1994) (holding that statutory contribution is unnecessary where an indemnification agreement encompasses CERCLA claims). However, equitable contribution may still come into play if a PRP is financially unable to satisfy its contractual indemnity obligations. *Lefton*, 14 F.3d at 326.

In the present case, there is little doubt that Wyle Electronics was a CERCLA PRP, as the owner and operator of the contaminated sites when toxic releases occurred. Now that Wyle Electronics no longer exists as an entity, the question is whether Arrow or E.ON is the successor to Wyle Electronics. Arrow argues that E.ON is the true successor to Wyle Electronics because, under the 2000 Share Purchase Agreement, E.ON promised to indemnify Arrow for

any Norco-related liability. (California Compl. ¶¶ 29-33, 64.) On that basis, Arrow seeks declaratory judgment that E.ON is liable under CERCLA section 107 for "any past, present, and future response costs incurred and proven by the plaintiffs in the Austin case as related to the release of hazardous substances at the Norco site." (*Id.* ¶ 66.) The same indemnity is sought for liability from the Huntsville site.

E.ON rejoins that Arrow's CERCLA contribution claim is subject to dismissal on two grounds. First, E.ON argues Arrow has waived its CERCLA remedies in the Share Purchase Agreement. Second, E.ON urges that the Share Purchase Agreement requires all related disputes to be litigated in Germany.

B. Waiver

Arrow claims that, under the Share Purchase Agreement, it is entitled to contractual indemnity for its CERCLA liability from E.ON. But the Share Purchase Agreement also made contractual remedies exclusive and waived all extra-contractual remedies. Section 8.5(b) of the Share Purchase Agreement provides that, other than remedies specified in the contract, the parties "waive any and all rights and remedies of any nature (contractual, quasi-contractual, tort, or otherwise), including any claims made under statutory representations and claims for negligent misrepresentation, which they may otherwise have against each other in connection with this

Agreement or the transaction contemplated hereby." (Fischer Decl. Ex. A at 95.) The plain language of the contract indicates that Arrow has waived its statutory remedies, including its right to contribution under CERCLA. Any liability Arrow incurs as a result of Wyle Electronics' past environmental contamination necessarily arises "in connection" with its purchase of Wyle Electronics from E.ON. If Arrow had not purchased Wyle Electronics from E.ON, Arrow would not have any liability related to Wyle Electronics' past environmental transgressions.[5]

The Ninth Circuit has enforced contractual waiver of CERCLA claims in a similar context. In *Mardan,* 804 F.2d 1454, the plaintiff Mardan Corporation had purchased a contaminated factory from Macmillan, the defendant, in 1980. In 1981, the two parties entered into a release agreement. In consideration for $995,000, Mardan released Macmillan from "all actions, causes of action, suits, . . . based upon, arising out of or in any way relating to the Purchase Agreement. . . ." *Id.* at 1456. Subsequently, Mardan became the subject of a government CERCLA action, and sued Macmillan for CERCLA contribution. Macmillan prevailed on summary judgment on the ground that CERCLA contribution was barred by

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[5] The Court notes that, although the Share Purchase Agreement contains a German choice of law clause, the parties have not pointed to any doctrine or provision of German contract law that would require a different interpretation.

the release agreement. The Ninth Circuit affirmed. As the court explained:

> [T]he language releasing Macmillan from all claims by Mardan 'based upon, arising out of or in any way relating to the Purchase Agreement' cannot . . . be limited to exclude Mardan's [CERCLA] section 107 claim, which certainly resulted from its acquisition of the property from Macmillan.

Id. at 1462. In the instant case, the Share Purchase Agreement's waiver of any claim "in connection with this Agreement or the transaction contemplated hereby" is no less broad than the release clause in *Mardan.* So long as Arrow seeks contribution for liability incurred as a result of its acquisition of Wyle Electronics, Arrow's claim is foreclosed by the waiver.[6]

Arrow presents five arguments why the waiver should not be enforced. None have merit. First, Arrow argues that contractual waiver is ineffectual to bar a CERCLA contribution claim because it is not among the affirmative defenses expressly provided by statute. CERCLA section 107(a) provides that a PRP's

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[6] It is immaterial that *Mardan* involved a release, while the Share Purchase Agreement here contains a waiver. The two terms are not distinguishable in any material way. A release is "the act of giving up a right or claim to the person against whom it could have been enforced." *Black's Law Dictionary* 1292 (7th ed. 1999). A waiver is the "voluntary relinquishment or abandonment – express or implied – of a legal right or advantage." *Black's Law Dictionary* 1576 (7th ed. 1999).

liability is limited only by the three affirmative defenses set forth in section 107(b) – that the pollution was caused by an act of God, an act of war, or an act of an unrelated third party. 42 U.S.C. § 9607(a)-(b). But it is irrelevant that contractual waiver is not recognized in section 107(b), because CERCLA section 107(e) expressly permits private allocation of CERCLA liability by contract. 42 U.S.C. § 9607(e). Arrow's reliance on *Western Properties,* 358 F.3d at 692, and *California v. Neville Chemical Co.*, 213 F. Supp. 2d 1115, 1125-26 (C.D. Cal. 2002), is inapposite. Those cases stand for the proposition that equitable defenses – including laches, unclean hands, waiver, and equitable estoppel – are not valid defenses to a CERCLA contribution action. An indemnity agreement recognized by section 107(e) is not an equitable defense; it is a defense expressly contemplated by the statutory scheme. Any contention to the contrary is foreclosed by *Mardan's* holding that a private release agreement could bar a CERCLA contribution action.

Second, Arrow claims the waiver is void under California Civil Code § 1668, which provides: "All contracts which . . . exempt anyone from responsibility for his own fraud, . . . or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668. However, as E.ON correctly points out, section 1668 does not apply to waivers set forth in indemnity agreements. *Lemat Corp. v. Am. Basketball Ass'n,* 51 Cal. App. 3d 267, 278-79 (1975).

Third, Arrow contends that the waiver is extinguished by section 8.5(c) of the Share Purchase

Agreement, which exempts from the waiver "any rights and remedies of any party for fraud or willful misconduct (Vorsatz)." (Fischer Decl. Ex. A.) This too is unpersuasive, because Arrow has not alleged any fraud on the part of E.ON.

Fourth, *Arrow* maintains that its statutory claims are preserved by section 8.5 of the Share Purchase Agreement, which states that the waiver is "without prejudice to any claim for specific performance or for any injunction or court order to enforce the rights set forth in this Agreement." (*Id.*) Plainly read, this clause means nothing more than that Arrow can seek a court order to enforce the contract; it does not exempt non-contractual statutory and tort remedies from the waiver.

Having secured contractual indemnity from E.ON and waived its extra-contractual remedies, Arrow may not now repudiate the waiver while attempting to hold E.ON to its indemnity obligation. Given the clear waiver expressed in the Share Purchase Agreement, Arrow's CERCLA claim must be dismissed.

C. Forum

E.ON has also moved to dismiss the CERCLA claim for improper forum. The Court finds that the Share Purchase Agreement's forum selection clause provides a separate, alternate ground for dismissal.

Forum selection clauses are "prima facie valid, and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Forum selection clauses are interpreted under federal law, and may be applied to both contract and tort claims. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). "Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." *Id.* Where a forum selection clause encompasses all claims "relating to" the contract, dismissal is warranted if the court has to interpret the contract to resolve the claim. *See id.* at 514-15; *Mediterranean Enterprises. Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (holding that an arbitration agreement that covers all claims "arising hereunder" applies to all claims "relating to the interpretation and performance of the contract.")

M/S Bremen recognizes the basic fact that international trade and commerce is dependent on the certainty provided by forum selection agreements. *M/S Bremen*, 407 U.S. at 13-14. "A contractual provision specifying in advance the forum in which, disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (enforcing arbitration agreement containing a French forum

selection clause against a plaintiff who brought federal securities law claims in a U.S. court). Nonetheless, the presumption in favor of enforcement may be overcome where "enforcement would be unreasonable and unjust, or . . . the clause [is] invalid for such reasons as fraud or overreaching." *M/S Bremen,* 407 U.S. at 15. Further, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.*[7]

As discussed above, unless one of the parties is financially incapable of its performing contractual obligations, statutory recovery under CERCLA is foreclosed if the parties' liability has already been apportioned by an indemnity agreement. *See Horsehead,* 258 F.3d at 145; *Lefton,* 14 F.3d at 326. In the instant case, it is undisputed that the Share Purchase Agreement is such an indemnity agreement. Since the Share Purchase Agreement requires any dispute "relating to" that agreement to be litigated in

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[7] Arrow maintains that *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22 (1988), rather than *M/S Bremen,* governs forum analysis here. *Stewart* is inapposite because it addressed forum non conveniens in a domestic controversy, rather than a motion to dismiss for improper forum in an international dispute. In *Manetti-Farrow,* the Ninth Circuit recognized this distinction when it explicitly applied *M/S Breman* rather than *Stewart Organization* to enforce a forum selection agreement between a Italian fashion house and its U.S. distributor. 858 F.2d at 512 n.2.

Germany, any claim that requires the interpretation of the Share Purchase Agreement must be dismissed for improper forum. *Manetti-Farrow,* 858 F.2d at 513-14. Under *M/S Bremen,* a forum selection clause is to be enforced absent a showing that it is unreasonable, unjust, fraudulent, or contrary to strong public policy. 407 U.S. at 15. Unless Arrow can carry this heavy burden, dismissal is warranted. Arrow makes a series of arguments why that should not be done. As the Court explains below, none has merit.

1. Litigation in Germany Is Not Precluded by 42 U.S.C. § 9613(b)

Arrow argues that litigation in Germany is barred by CERCLA's exclusive federal jurisdiction provision, which provides: "[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act. . . . 42 U.S.C. § 9613(b). Arrow's reliance on this section is misplaced. While a federal district court has exclusive jurisdiction over a statutory contribution claim, the same does not apply to a contractual indemnity claim. In *Horsehead,* the Third Circuit held that the plaintiff's statutory contribution claims were precluded by an earlier state court judgment enforcing a CERCLA indemnity agreement between the parties. 258 F.3d at 145. In other words, once a state court, applying state contract law, has found an indemnification agreement to encompass CERCLA, a party to that agreement may not assert a statutory recovery claim to undo the state court decision in federal court.

In the present case, Arrow alleges that E.ON is liable for indemnity under the Share Purchase Agreement. The claim is essentially contractual, just like the state court claim in *Horsehead,* and does not implicate exclusive federal jurisdiction over CERCLA statutory liability. Arrow argues, in effect, that Congress implicitly gave the federal courts exclusive jurisdiction over state contract law claims[8] as long as they are related to CERCLA. Arrow cites no precedent for that proposition. Because Arrow's claim essentially sounds in contract, requiring Arrow to bring its claim in Germany would not violate CERCLA's exclusive federal jurisdiction provision.

2. The Indemnitee Is Not Free to Choose Between Contract and Statutory Remedies

Arrow does not dispute that an indemnity agreement would bar CERCLA contribution claims made by the indemnitor. However, Arrow argues for a distinction between the indemnitor and the indemnitee. In Arrow's view, a CERCLA plaintiff who claims the benefit of an indemnity agreement remains free to elect either a contract action or a statutory contribution action.

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[8] To be precise, the contract at issue is governed by the law of Germany rather that of an American state. Nonetheless, the analysis is the same with regards to the question of exclusive federal jurisdiction.

Arrow's argument strains logic. Under CERCLA section 107(e)'s policy of enforcing private indemnity agreements, an indemnitor is prevented from pursuing statutory remedies precisely because of the existence of the indemnity agreement. Arrow has articulated no reason why the same reasoning should not apply to the indemnitee who is no less of a party to the contract than the indemnitor. If the indemnitor is to be held to the contractual bargain, so should the indemnitee. Indeed, it is highly unusual for a beneficiary of an indemnity agreement, such as Arrow, to seek a statutory contribution remedy, since the purpose of negotiating an indemnity agreement is to obtain reimbursement beyond what the statute provides. Clearly, Arrow is couching its claim in CERCLA terms in order to escape the effect of the forum selection clause.

The case on which Arrow primarily relies, *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d 1019 (9th Cir. 2002), is distinguishable. It involved a rubber production plant built during World War II by Dow Chemical under the direction of the United States government. Pursuant to an indemnity agreement, the government promised to hold Dow Chemical harmless for liability arising from the rubber factory. After the war, ownership of the site eventually passed to a developer. *Id.* at 1022-23. The developer sued Dow Chemical and the United States, among others, for CERCLA contribution. Dow and the government then cross-claimed against each other for CERCLA contribution as well. Importantly, the

plaintiff developer had no contract with either Dow Chemical or the United States. Therefore, the plaintiff's CERCLA contribution claim was not affected by any indemnity agreement. The district court found both Dow and United States to be responsible parties under CERCLA, and allocated 100% of the liability to the United States on equitable considerations, one of which was the government's promise to indemnify Dow. On appeal, the United States argued that the district court could not consider the indemnity agreement as a factor, because only the Court of Claims had jurisdiction to enforce it under the Tucker Act. The Ninth Circuit rejected this argument, holding that the Tucker Act was immaterial because the district court did not enforce the contract, and had merely considered it as an equitable factor. *Id.* at 1027-28.

Arrow sees itself in the position of Dow Chemical, which had an indemnity agreement with the United States, and obtained the equivalent of indemnity through statutory liability apportionment. However, Arrow ignores the fact that the plaintiff developer in *Cadillac Fairview* had no contract with either Dow Chemical or the government, and therefore had independent statutory contribution claims against both. The court in *Cadillac Fairview* had to apportion liability regardless of what contract, if any, Dow Chemical had with the United States. In the present case, neither E.ON nor Arrow is a defendant in a statutory contribution action that is not barred by an

indemnity agreement. Thus, the Court has no independent basis for proceeding with statutory apportionment of liability outside of the relationship between E.ON and Arrow. As discussed above, any contractual indemnity claim between E.ON and Arrow must be litigated in Germany.

3. *Public Policy*

Under *M/S Bremen,* an international forum selection clause should not be enforced if it contravenes a strong public policy of the forum state. 407 U.S. at 15. Arrow argues that enforcement of the forum clause is contrary to California public policy as declared in *Ford Motor Co. v. Insurance Co. Of North America,* 35 Cal. App., 4th 604 (Cal. Ct. App. 1995). In *Ford Motor,* the plaintiff had ownership interests in several contaminated sites in California, and sued out-of-state insurance companies to establish its right to insurance coverage for environmental liability. The trial court dismissed the suit on the ground of forum non conveniens. The California Court of Appeal reversed, partly on the ground that California had a substantial interest in "the general availability of insurance coverage for environmental pollution cleanup." *Id.* at 614.

E.ON maintains that no such interest exists here. E.ON contends that because the Austin plaintiffs sued E.ON directly, they can recover regardless of any indemnification agreement between Arrow and E.ON. However, the Austin plaintiffs' recovery

against E.ON may be independent of their claims against Arrow. For example, the Austin plaintiffs might recover against E.ON for the alleged coverup of pollution between 1997 and 2000, and also recover against Arrow, the present owner of Wyle Electronics, for actually causing the pollution over two decades. In that scenario, the funds recovered from E.ON would have no connection to Arrow's own liability and E.ON's alleged obligation to indemnify Arrow. Thus the mere fact that E.ON is a defendant in the Austin suit does not extinguish the state's interest in the availability of indemnity funds. The question is whether that policy interest is sufficiently strong to overcome the powerful *M/S Bremen* presumption.

The Court notes that Arrow's burden here is greater than what the plaintiff faced in *Ford Motor*. *Ford Motor* involved the application of forum non conveniens, an equitable doctrine which gives courts considerable discretion in weighing the convenience of the parties. The plaintiff's choice of forum is presumed to be convenient, and the *Ford Motor* court ultimately ruled in the plaintiff's favor. 35 Cal. App. 4th at 610-11, 618-19. Here the Court is applying *M/S Bremen,* and the presumption runs in the opposite direction, in favor of Defendant in this case. To overcome the presumption, Arrow must show fraud, unreasonableness, or injustice, or contrary public policy. Those factors are harder to establish than inconvenience.

In fact, California's public policy interest appears to be weaker here than it was in *Ford Motor*. By

making a host of PRPs jointly and severally liable to the government, CERCLA makes it likely that environmental remediation will be fully paid for. In contrast, in *Ford Motor,* no similar statute protected California's interest in insurance funds. The defendants were insurance carriers rather than CERCLA-liable PRPs. The state's interest was heightened because third party beneficiaries generally lack contractual standing to sue insurance providers. *See Prudential Reins. Co. v. Superior Court,* 3 Cal. 4th 1118 (1992) (holding that insured may not sue reinsurer due to lack of contractual privity). In contrast, if E.ON is a CERCLA PRP as Arrow alleges,[9] nothing stops the federal and state governments from suing E.ON directly to collect cleanup funds.

The strength of California's interest is further diminished in light of the countervailing federal policy of promoting flexible contracting of environmental liability. CERCLA section 107(e) expressly permits PRPs to shift their liability freely through indemnity agreements. Businesses will be more reluctant to enter into such transactions if a party is permitted to cherry-pick contractual terms, enforcing provisions it likes but ignoring others. Cherry-picking is precisely what Arrow is now attempting to do, in its effort to bind E.ON to the indemnity terms of the 2000 Share Purchase Agreement while seeking to

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[9] Of course, E.ON denies that it is a PRP, but that is not at issue at this moment.

invalidate the forum selection clause contained in the very same contract.

Another factor in favor of E.ON is that enforcing the forum selection clause is consistent with the Share Purchase Agreement's choice-of-law provision. While the *Ford Motor* court based its decision partly on the fact that California law governed the insurance contracts at issue, 35 Cal. App. 4th at 614,[10] in the present case German law governs the interpretation of the Share Purchase Agreement. Obviously, a German court is better suited to adjudicating a German contract law dispute. In response, Arrow contends that German law disfavors the enforcement of forum selection clauses in environmental disputes. Arrow has submitted a declaration from a German law expert stating that "if the Huntsville and Norco facilities at issue . . . were [German] domestic sites governed by German law, any agreement selecting the jurisdiction of a foreign country for disputes involving environmental damages related to these sites would be invalid and unenforceable." (Pfeiffer Decl. ¶ 20.) This argument is irrelevant because Norco and Huntsville are not located in Germany.

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[10] In *Ford Motor*, the California Court of Appeal applied California choice-of-law rules in holding that the location of insured risk determined the choice of law to be applied in an insurance contract; because the contaminated sites were located in California, California law governed the policies. 35 Cal. App. 4th at 614.

It should be noted that the parties have not cited any precedent that either enforced or declined to enforce, on public policy grounds, a foreign forum selection clause implicated in a claim for indemnification of CERCLA liability. Nonetheless, enforcement would be consistent with the analogous case of *Olin Corp. v. Fisons PLC,* 47 F. Supp. 2d 151 (D. Mass. 1999). Olin, an owner of contaminated sites in Massachusetts, filed CERCLA contribution claims against a host of past owners, including NOR-AM and Fisons, a pair of European companies. NOR-AM then cross-claimed against Fisons for CERCLA contribution and for contractual indemnification. The court first dismissed NOR-AM's CERCLA contribution cross-claim.[11] The court then dismissed the contractual indemnity claim on the ground of forum non conveniens, because "[w]hether one foreign company ultimately must indemnify another for its contribution to clean-up costs is not of particular interest to Massachusetts."[12]

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[11] This occurred because Olin eventually settled with Fisons, and promised that "it will not seek recovery from the non-settling defendants any portion of Fisons' equitable share of Olin's environmental response costs. . . ." (Joint Brief of Plaintiff Olin Corp. and Defendant Fisons PLC at 3, *Olin Corp. v. Fisons PLC,* No. 93-11166-MLW (D. Mass. March 4, 1999), reproduced at Koch 11/07/2005 Decl. Ex. D.) Because Olin promised not to seek from NOR-AM the recovery for which NOR-AM sought contribution from Fisons, NOR-AM's CERCLA cross-claim against Fisons became moot. What remained was the contractual cross-claim, under which NOR-AM sought indemnification for NOR-AM's own equitable share of cleanup costs.

[12] Arrow argues that the claim was one of "pure" contractual indemnity and did not relate to CERCLA. That is a mischaracterization. Olin had sued NOR-AM for CERCLA contribution.

(Continued on following page)

Id. at 159. Similarly, whether E.ON reimburses, Arrow does not appear to be a pressing concern to California or the Austin plaintiffs – at least not one sufficiently pressing to overcome the *M/S Bremen* presumption.

California public policy does not bar enforcement of the instant forum selection clause.

4. *The Share Purchase Agreement Encompasses E.ON's Direct CERCLA Liability*

Arrow contends that the Share Purchase Agreement allocates only the liability of Wyle Electronics, not E.ON, so it has an independent statutory contribution claim that is not encompassed by the Share Purchase Agreement and its forum selection clause. To address this argument, it is important to recall that neither Arrow nor E.ON ever owned the Norco and Huntsville sites. Wyle sold the sites to Wyle Labs before Wyle Electronics was itself acquired by E.ON and then Arrow. But in addition to the issue of successor liability to Wyle Electronics, Arrow alleges that VEBA Electronics, E.ON's U.S. subsidiary, has engaged in direct conduct at Norco – certain environmental investigations between 1997-2000 – that would subject E.ON to CERCLA liability. Specifically, E.ON was allegedly VEBA Electronics' alter ego and

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NOR-AM's subsequent contractual indemnity cross-claim against Fisons must have sought reimbursement for NOR-AM's CERCLA liability to Olin.

participated in all of the latter's significant decisions. Under *United States v. Bestfoods,* 524 U.S. 51, 64-65 (1998), a corporate parent may incur CERCLA liability for a subsidiary's activities if the parent makes decisions regarding environmental compliance for the subsidiary. Arrow maintains that the portion of E.ON's CERCLA liability attributed to those investigations was not addressed by the Share Purchase Agreement, so that its statutory contribution claim could proceed regardless of the Agreement.

Arrow relies on *Schiavone v. Pearce,* 79 F.3d 248 (2d Cir. 1996), which warrants close discussion. Union Camp Corporation sold its subsidiary AmCre Corp., which operated a polluting factory, to Kerr-McGee Chemical Corporation in 1964. Pursuant to an indemnity agreement, Union Camp promised to hold harmless Kerr-McGee for any legal claims instituted prior to 1965. The indemnification covered "[a]ny obligation or liability of [AmCre Crop. [sic]] under or pursuant to any legal action . . . based on a cause of action arising out of or attributable to the operations or activities of [AmCre Corp.]. . . . " *Id.* at 250. Liability for actions instituted after 1965 was transferred to Kerr-McGee, even if the conduct giving rise to the action took place during Union Camp's period of ownership. In 1984, a subsequent owner of the factory sued Kerr-McGee for CERCLA contribution, and Kerr-McGee in turn filed a third-party CERCLA action against Union Camp. The district court granted summary judgment for Union Camp, on the ground that the indemnification agreement foreclosed

the statutory contribution action. The Second Circuit reversed, finding that as a matter of contract interpretation, the indemnification agreement covered only the liabilities of AmCre Corp. Only AmCre Corp.'s liability was transferred to Kerr-McGee for actions instituted after 1965; any direct liability on the part of Union Camp was not affected by the contract. The case was remanded to the district court, which then considered whether Union Camp had direct liability under the standard set forth in *Bestfoods*. *See Schiavone v. Pearce,* 77 F. Supp. 2d 284 (D. Conn. 1999).

Relying on *Schiavone,* Arrow urges that because the Share Purchase Agreement allocates only the liability of Wyle Electronics but not E.ON, Arrow is entitled to statutory contribution from E.ON for its direct liability regardless of how the Share Purchase Agreement apportioned Wyle Electronics' environmental liability. Like *Schiavone,* the issue here is essentially one of contract construction. If the Share Purchase Agreement indeed allocates the liability of only Wyle Electronics but not E.ON, then Arrow would have an independent statutory action against E.ON, assuming that Arrow has pleaded sufficient facts to support a claim of direct liability.

But examination of the Share Purchase Agreement shows Arrow's argument to be without merit. Again, section 7.10 provides,

> Sellers shall indemnify and hold harmless each of the Purchasers . . . and each member

> of the Group from and against any of the following liabilities:
>
> . . .
>
> (b) any losses, liabilities, damages, costs and expenses (including any claims for taxation) whether current or contingent, which relate to the disposal of any business by any member of the Group prior to the Effective Date which business does not relate to the distribution of electronic systems or electronic components[.]

(Fischer Decl. Ex. A at 76-77) (emphasis added). In the contract VEBA Electronics is listed among the "Sellers;" Arrow is among the "Purchasers;" and the "Group" consists of companies that were sold in the transaction, including EBV Electronics Holdings, which held all of the shares of Wyle Electronics. The "disposal" of any business "not related to the distribution of electronics systems" includes Wyle Electronics' spinoff of Wyle Labs and the Norco facility in 1994. In other words, this provision requires VEBA Electronics and E.ON[13] to indemnify Arrow for liability relating to the divestiture of Wyle Labs. When the investigations at Norco took place between 1997 and 2000, neither E.ON nor VEBA Electronics owned or operated the Norco site. The investigations could have been

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[13] Under Section 11.2 of the Share Purchase Agreement, E.ON is jointly and severally liable for all of VEBA Electronics' liabilities under the contract. (Fischer Decl. Ex. A at 117.)

undertaken only in connection with Wyle Electronics' obligations to Wyle Labs pursuant to the 1994 Asset Purchase Agreement. Clearly, these investigations related to the divestiture of Wyle Labs. Since the Share Purchase Agreement did allocate the liability of E.ON and VEBA Electronics, Arrow does not have an independent CERCLA claim against them.

5. Other Issues

Arrow's remaining arguments are likewise unpersuasive. Arrow argues that *M/S Bremen* does not apply because the controversy is not "truly international." (Opp'n at 12.) Arrow cites *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1069 n.17 (9th Cir. 2000), which held that a court may exercise personal jurisdiction over a foreign corporation on the basis of the activities of its subsidiary if the subsidiary is an empty shell over which the parent exercises total control. According to Arrow, because VEBA Electronics is E.ON's alter ego, the Share Purchase Agreement should be regarded as a domestic rather than international agreement. However, regardless of the nature of the relationship between VEBA Electronics and E.ON, the fact remains that E.ON is a party to the Share Purchase Agreement in its own right. And the fact remains that E.ON is a German corporation and Arrow a U.S. corporation. There can be no doubt that the Share Purchase Agreement is an international agreement for purposes of *M/S Bremen*.

Arrow also argues that because the Norco facility performed testing work for the U.S. military, national security requires resolution of the dispute in an American forum. Arrow relies on *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988) and *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996), which stand for the proposition that federal common law and federal jurisdiction apply to government contracts. However, the Share Purchase Agreement is not a government contract. Neither is it a subcontracting agreement undertaken pursuant to a government procurement program. It is a contract between two private corporations. *Boyle* and *New SD* are inapplicable.

Arrow further advocates that a forum selection agreement is unenforceable where the interests of third parties, including the Austin plaintiffs and state environmental regulators, are "inextricably intertwined" with E.ON's alleged obligation to Arrow. The main case upon which Arrow relies, *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), is inapposite. The issue in that case was whether an employment contract's arbitration agreement, which is binding on the employee, prevents the EEOC from pursuing a civil action against the employer. Rejecting arguments that an arbitration agreement which the EEOC did not sign nonetheless bound the agency, the Supreme Court held that the EEOC has clear statutory authority to enforce federal law regardless of private agreements between employees and employers. *Waffle House* might be analogous if there were

any contention in this case that anyone other than Arrow and E.ON was bound by the forum selection clause. But there is no such contention. And *Waffle House* is ultimately a case about statutory interpretation; there is no similar statute involved here.

In any event, it is hard to see how the rights of third parties would be substantially impacted by the forum selection clause. To the extent that third parties have direct claims against E.ON which do not arise from the 2000 Share Purchase Agreement, the forum selection clause does not bind them. To the extent that third parties have an indirect interest in the E.ON-Arrow dispute because E.ON is Arrow's indemnitor, the argument merely restates the public policy argument already discussed and rejected above.

Next, Arrow contends that E.ON consented to forum in California because the 1997 tender offer agreement has a California forum selection clause. However, Arrow's claim is brought pursuant to the 2000 Share Purchase Agreement, not the 1997 tender offer agreement. Arrow has not even alleged that it was a party to the tender offer agreement. Neither has it alleged that the 1997 tender offer agreement contains an indemnity clause that provides a basis for Arrow's recovery.

Lastly, Arrow claims that the German forum would be unfair because German law does not permit punitive damages or pretrial discovery. Arrow should have been aware of these features of the German

legal system when it signed the Share Purchase Agreement in 2000. The relative lack of pretrial discovery in German courts has long been well-known. *See, e.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 827-29 (1985) (describing the German system of civil procedure). And Arrow has not even stated a claim for punitive damages. Arrow's protestation of unfairness fail to meet *M/S Bremen*'s requirement that the party resisting the foreign forum must demonstrate "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." 407 U.S. at 18.

D. Summary

In sum, because Arrow has expressly waived its extra-contractual remedies in the Share Purchase Agreement, its CERCLA claim against E.ON must be dismissed. Alternatively, dismissal is also warranted for improper forum, since the Share Purchase Agreement contains a mandatory German forum selection clause.[14]

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[14] Arrow has requested an opportunity to take discovery on evidence relating to the interpretation of the Share Purchase Agreement and also on E.ON's environmental investigation and remediation activities at Norco. The Court finds discovery to be unnecessary because the above analysis is premised on the plain language of the Share Purchase Agreement, and assumes that the investigations took place as alleged in Arrow's pleading.

VI. The HSAA

The HSAA, Cal. Health & Safety Code § 25300 *et seq.*, is California's Superfund statute. It explicitly references and incorporates terms of CERCLA. Any party that is a PRP under CERCLA is also strictly liable under the HSAA. Cal. Health & Safety Code §§ 25323.5(a)(1) and 25363(d). Section 25363(d), the analogue to CERCLA sections 107(a) and 113, provides that any person who has incurred removal or remedial action costs in accordance with the HSAA or CERCLA has a HSAA statutory cause of action for contribution or indemnity from a PRP. Cal. Health & Safety Code § 25363(e). The HSAA recognizes private apportionment of liability. Like CERCLA section 107(e), section 25364 provides that "[t]his section shall not bar any agreement to insure, hold harmless, or indemnify a party to the agreement for any costs or expenditures under this chapter." Cal. Health & Safety Code 25364. The Court has not found any authority interpreting HSAA section 25364 differently from CERCLA section 107(e). In fact, Arrow agrees that "the HSAA tracks CERCLA's liability and defense provisions." (Arrow Res. at 6.)

Thus, Arrow's HSAA claims are subject to dismissal for the same reason as its CERCLA claims. First, Arrow has waived all of its extra-contractual remedies through the Share Purchase Agreement. Alternatively, under the terms of the Share Purchase Agreement, Arrow is required to litigate the case in Germany. Although further discussion at this point would ordinarily be unnecessary, the Court will

address the concerns raised by a letter from California's Department of Toxic Substance Control, which urged that the Court, not enforce the German forum-selection clause.[15]

The DTSC is the agency responsible for administering the HSAA. Any party making a HSAA contribution action is required to "give written notice to the [DTSC] upon filing an action or cross complaint. . . ." Cal. Health & Safety Code § 25363(e). In the letter, which was written by its assistant general counsel, the DTSC explains that "[t]his statutory precondition gives the State notice and an opportunity to intervene, or otherwise participate in the action (for example, as amicus curiae), in order to protect the State's interests." (Koch 11/14/2005 Decl. Ex. B at 2.) The letter goes on to state:

> There are two very strong public policy concerns with respect to the forum for such statutory contribution actions. It is true that the statute only seeks to adjust the liability as between the liable parties. Nonetheless, DTSC's experience has been that any adjudication of the relative shares of costs and

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[15] Under *M/S Bremen*, only a public policy "declared by statute or by judicial decision" can override the presumption in favor of enforcing forum selection agreements. 407 U.S. at 15. The DTSC letter is neither a statute nor a judicial decision, nor is it a legally binding equivalent such as an agency rule adopted through the formal rulemaking process. Nonetheless, the Court has carefully considered the letter, as it explains the agency's view of the public policy concerns implicated in the case.

> expenditures can potentially prejudice DTSC's rights to recover its costs from any party adjudged to have little or minimal relative liability. The potential for prejudice to the interests of DTSC, the California taxpayers, and the environment of the State, occasionally requires DTSC to become involved in contribution and indemnity actions. If the action between Arrow and E.ON AG is brought in the courts of Germany, DTSC is effectively denied the opportunity to participate. Second, a German court might generally interpret section 25363(e) in a manner contrary to State statutory law. If the action remained in the California courts, this potentially could be avoided by notice to, and participation by, DTSC in the lawsuit.

(*Id.*) "For these reasons, DTSC believes that the Court should find that the proper forum for a Section 25363(e) claim is in a California Court." (*Id.*)

At the outset, the Court emphasizes that dismissal of Arrow's HSAA claims is warranted on waiver grounds, regardless of how the forum issue is decided. In any event, the DTSC's worries are overstated. Its primary concern seems to be that in a statutory contribution action, because the court will apportion liability according to equitable factors, including each party's share of blame for contamination, a judicial determination of facts regarding the pollution may prejudice the DTSC's ability to pursue its own remedies against polluters. In the present case, Arrow's claim essentially sounds in contract.

The German court will not be apportioning liability under statutory contribution rules, but strictly under the terms of the indemnity agreement. Surely the DTSC cannot be bound by the effect of a contractual judgment regarding E.ON's liability to Arrow. If DTSC believes that E.ON is a PRP, then nothing stops DTSC from pursuing its remedy against E.ON in California. DTSC will not be bound by any judicial determination of E.ON's liability for statutory contribution – because neither this Court nor any German court will allocate E.ON's liability under the statutory contribution rules. The German court will not be interpreting HSAA section 25363(e), so DTSC need not fear that the German court will interpret it erroneously.

The Ninth Circuit's discussion in *Mardan* is instructive. As the court explained,

> Contractual arrangements apportioning CERCLA liablity [sic] between private "responsible parties" are essentially tangential to the enforcement of CERCLA's liability provisions. Such agreements cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability. Moreover, regardless of how or under what law these agreements are interpreted, the result cannot prejudice the right of the government to recover cleanup or closure costs from any responsible party . . .

804 F.2d at 1459. Because DTSC has its own remedies against E.ON independently of the litigation

between E.ON and Arrow, California's interest in an opportunity to participate in the E.ON-Arrow dispute is not sufficiently strong to overcome the *M/S Bremen* presumption in favor of enforcing international forum selection clauses.

Like its CERCLA claims, Arrow's HSAA claims are subject to dismissal.

VII. EQUITABLE INDEMNITY

Arrow's equitable indemnity claim stems from the Austin plaintiffs' allegation that public health risks at Norco were fraudulently concealed between 1998-2000. Arrow maintains that E.ON should be exclusively responsible for any concealment proven by the Austin plaintiffs, because its subsidiary conducted environmental investigations at Norco during that period. Arrow emphasizes that equitable indemnity liability "is not dependent on any contractual provisions, but arises in addition directly from VEBA Electronics' active role in the testing, investigation, and remediation (and lack thereof) of the Norco site in the 1998-2000 time frame." (California Compl. ¶ 77.)

California recognizes two sources of indemnity: express contractual indemnity and equitable indemnity. *E.L. White, Inc. v. City of Huntington Beach*, 21 Cal. 3d 497, 506-07 (1978). The latter finds "its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular

case." *Id.* In other words, equity may provide an independent basis of indemnity even in the absence of an explicit indemnity agreement. This is what Arrow means when it argues that its equitable indemnity claim "is not dependent on any contractual provisions." (California Compl. ¶ 77.) For example, if a hypothetical third company had purchased Wyle Electronics from E.ON, and Arrow then purchased Wyle Electronics from the third party, Arrow may be entitled to assert an equitable indemnity claim against E.ON for torts E.ON committed during its ownership of Wyle Electronics even though there is no contractual privity between Arrow and E.ON.

The problem is that Arrow *does* have a contract with E.ON. "[W]hen parties by express contractual provision establish a duty in one party to indemnify another, 'the extent of that duty must be determined from the contract and not from the independent doctrine of equitable indemnity.'" *E.L. White*, 21 Cal. 3d at 508 (quoting *Markley v. Beagle*, 66 Cal. 2d 951, 961 (1967)). To the extent that Arrow seeks an extra-contractual remedy by pleading equitable indemnity, it is foreclosed by the Share Purchase Agreement's waiver provision. Moreover, the equitable indemnity is subject to the Share Purchase Agreement's forum selection clause, which specifies that any dispute "relating to" the contract must be litigated in Germany. Under *Manetti-Farrow*, an international forum selection clause should be enforced if the claim at issue requires the interpretation of that contract. 858 F.2d at 514. To adjudicate Arrow's equitable

indemnity claim, the Court must first interpret the 2000 Share Purchase Agreement to determine whether the indemnity provisions encompass the alleged concealment of health risks, which would run afoul of the forum selection clause. Just like the CERCLA and HSAA claims, the equitable indemnity is subject to dismissal on grounds of waiver and improper forum.

VIII. ARROW'S OTHER CLAIMS

Arrow advances a variety of contract-based claims premised on the Share Purchase Agreement in its California and Alabama complaints. In the California complaint, Arrow pleads breach of contract, and additionally seeks declaratory judgment of the parties' rights and obligations under the Share Purchase Agreement. These claims plainly fall within the scope of the forum selection clause and must be dismissed for improper forum. The same applies to Arrow's unfair competition claim, seeks the entry of "an injunction requiring E.ON to perform the mandate ordered by the California Regional Water Quality Control Board on July 31, 2000, which E.ON assumed when it sold the assets of VEBA Electronics." (California Complaint ¶ 99) (emphasis added). On its face, resolution of the unfair competition claim requires interpretation of the Share Purchase Agreement. It must be dismissed for improper forum.

Arrow's claims of unjust enrichment and promissory estoppel, which are pleaded in the Alabama

complaint, are likewise barred from proceeding in California. In Arrow's view, E.ON was unjustly enriched by Arrow's payment of clean-up costs for the Huntsville site because E.ON was responsible for such payments under the Share Purchase Agreement. (First Alabama Compl. ¶¶ 72-73.) The Court will have to interpret the indemnity agreement to adjudicate the claim. The promissory estoppel claim is also based on E.ON's promise to reimburse Arrow for environmental compliance costs. Since analyzing E.ON's promise and Arrow's reliance would require interpretation of the Share Purchase Agreement, (First Alabama Compl. ¶¶ 79-82), the claim must proceed in Germany rather than California.

Arrow's remaining claims do not concern environmental liabilities. In the Alabama complaint, Arrow makes a claim for accounts stated in connection with tax liabilities that were allegedly assumed by E.ON under the Share Purchase Agreement. This claim is subject to the Share Purchase Agreement's forum selection clause. In a proposed amendment to the Alabama pleading, Arrow also seeks to recover for breach of warranty in connection with E.ON's, acquisition of Wyle Electronics in 1997. E.ON allegedly failed to purchase all shares of Wyle Electronics in the tender offer, such that Arrow had to buy out outstanding shareholders of Wyle Electronics with its own funds. This is essentially a breach of warranty claim. Arrow points out that section 8.5 of the Share Purchase Agreement expressly exempts claims relating to the failure to transfer shares from the general

waiver of non-contractual remedies in the SPA. However, an exemption from the waiver clause is not an exemption from the forum selection clause. Accordingly, it is subject to dismissal for improper forum.

IX. E.ON'S MOTION AGAINST WYLE LABS

Wyle Labs is party to just a single cause of action against E.ON:[16] the fifth count in the California complaint, which seeks declaratory judgment of the rights and obligations of all parties under the 1994 Asset Purchase Agreement, the 2000 Share Purchase Agreement, and CERCLA.[17] Wyle Labs is a party to the 1994 Asset Purchase Agreement, but not the 2000 Share Purchase Agreement. Wyle Labs' claim is essentially one for indemnity pursuant to the Asset Purchase Agreement, which was entered into between Wyle Labs and, Wyle Electronics.

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[16] The California complaint was ambiguous as to whether Wyle Labs stated a CERCLA contribution claim against E.ON. E.ON moved for judgment on Wyle Labs' CERCLA claim, but Wyle Labs' response did not address the CERCLA issue. Accordingly, the Court treats Wyle Labs' CERCLA claim as either never presented or abandoned.

[17] In proceedings in Alabama, Wyle Labs had requested to be realigned as a plaintiff so that it could state a claim for declaratory judgment against E.ON to vindicate its indemnity rights under the 1994 Asset Purchase Agreement. That proposed claim is identical to the fifth cause of action in the California complaint. The Court therefore treats them as a single claim in the consolidated actions.

E.ON seeks judgment on the pleadings against Wyle Labs pursuant to Federal Rule of Civil Procedure 12(c). "Judgment on the pleadings is proper when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Torbet v. United Airlines, Inc.*, 298 F.3d 1087, 1089 (9th Cir. 2002). A 12(c) motion "may only be granted when the pleadings show that it is 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co. Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997) (internal citation omitted).

Wyle Labs's primary goal is to vindicate its right to indemnity from Wyle Electronics under the 1994 Asset Purchase Agreement. Now that Wyle Electronics no longer exists, Wyle Labs' contract claim against E.ON may proceed only if E.ON is the successor to Wyle Electronics. Although there is no question that E.ON assumed Wyle Electronics' obligations after completing the tender offer transaction in 1997, E.ON insists that it lost successor status when it sold Wyle Electronics to Arrow in 2000. In E.ON's view, Wyle Labs may enforce the 1994 Asset Purchase Agreement against Arrow only.

"It is the general rule that a corporation formed by consolidation or merger is answerable for the debts and liabilities of the constituent corporations, whether they arise ex contractu or ex delicto." *Moe v. Transamerica Title Ins. Co.*, 21 Cal. App. 3d 289, 304 (Cal. Ct. App. 1971); *see also Black's Law Dictionary*

1446 (7th ed. 1999) (defining successor as "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation"). Section 1.1(a)(v) of the 2000 Share Purchase Agreement provides that "VEBA Electronics LLC hereby sells to Arrow and Arrow hereby purchases from VEBA Electronics LLC all the shares in issue in EBV Electronics Holdings, Inc. . . ." (Fisher Decl. Ex. A at 15). EBV was the entity that held the shares of Wyle Electronics. "After the transfer of the stock to Arrow, Wyle Electronics merged into Arrow on February 8, 2001." (First Alabama Compl. ¶ 22.) Since Arrow has consolidated Wyle Electronics into its corporate structure, Arrow is the successor to Wyle Electronics's obligations under the 1994 Asset Purchase Agreement.

It is immaterial that E.ON promised to "indemnify and hold harmless" Arrow for Wyle Electronics' liabilities in the 2000 Share Purchase Agreement. (Fischer Decl. Ex. A at 77.) To indemnify means "to reimburse (another) for a loss suffered because of a third party's act or default." *Black's Law Dictionary* 772 (7th ed. 1999). A promise of reimbursement is not the same as the direct assumption of liabilities by a corporate successor. Neither does Wyle Labs have standing as a third party beneficiary to sue E.ON under the 2000 Share Purchase Agreement. Generally, "[w]here an intended beneficiary has an enforceable claim against the promisee, he can obtain a judgment or judgments against either the promisee or

the promisor or both based on their respective duties to him." *Restatement (Second) of Contracts* § 310 (1979). But if Wyle Labs sues under the 2000 Share Purchase Agreement, it would be suing in Arrow's shoes – which means that it would be subject to the German forum selection clause, like Arrow itself. *Cf. Syufy Enters. v. City of Oakland*, 104 Cal. App. 4th 869, 888 (Cal. Ct. App. 2002), (holding that a party claiming third party beneficiary status under a contract must accept the contract as a whole). To permit Wyle Labs to sue E.ON in California as a third party beneficiary would give the third party more rights than the contracting party.

Accordingly, the Court finds that E.ON is not the successor to Wyle Electronics for purposes of the 1994 Asset Purchase Agreement. Judgement on the pleadings will be granted for E.ON on Wyle Labs' contract claim.

X. CONCLUSION

For the foregoing reasons, the Court rules as follows. Arrow's CERCLA, HSAA, and equitable indemnity claims are DISMISSED on the grounds of waiver and improper forum. Arrow's claims for breach of contract, declaratory judgment of contractual rights, unjust enrichment, promissory estoppel, accounts stated, and breach of warranty are DISMISSED for improper forum. The Court DENIES Arrow's request for reconsideration of the prior dismissal in the Alabama case. The Court GRANTS

E.ON's motion for judgment on the pleadings as to Wyle Labs' claim under the 1994 Asset Purchase Agreement.

IT IS SO ORDERED.

DATED: 8/2/06

/s/ Stephen Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARROW ELECTRONICS, INC., Plaintiff-Appellant, v. E.ON AG, Defendant-Appellee, and WYLE LABORATORIES, INC., Cross-claimant-Appellee, v. ARROW ELECTRONICS, INC., Cross-defendant-Appellant.	Nos. 06-56277, 06-56315 D.C. Nos. CV-05-02388-SVW CV-05-05154-SVW Central District of California, Los Angeles ORDER (Filed Apr. 11, 2008)

Before: GRABER and BERZON, Circuit Judges, and WILKEN,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Graber and Berzon have voted to deny the petition for rehearing en banc, and Judge Wilken has so recommended.

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* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

[LOGO]

[Names, Addresses And
Phone Numbers Omitted In Printing]

via courier and via fax: 001 - 631 - 847 54 58

Mr. Wayne Brody
Vice President Legal Affairs
Arrow Electronics, Inc.
50 Marcus Drive
Melville

USA – NY 11747-4210

March 4, 2003

Norco and Huntsville

Dear Mr. Brody:

Thank you for your letter dated February 19, 2003.

We agree with you that the meeting in person in New York end of January was very helpful to get a better understanding for each other's positions.

However, we deem it important to lay down again E.ON's position, especially in response to your above mentioned letter;

1. General Basis for indemnification by E.ON

Any indemnification claim against E.ON must be in line with the provisions of the Share Purchase Agreement between E.ON and Arrow (hereafter "SPA") and the 1994 Asset Purchase Agreement (hereafter "APA"). Although you have provided us with substantial information so far, we have still not

received a full description of the claims in accordance with Section 8.4 of the SPA, so that we can independently assess the legitimacy. For example, we do not see how a pure indemnification obligation can be classified as Clean-up Costs or Non-compliance Costs under the SPA, and we are still missing the facts which prove the survival of the indemnification claim under the APA.

Furthermore, we believe that the rights of the buyer under the APA shall be limited due to the fact that the contamination of the sites were known to all parties before the transaction, and accordingly, no breach of any representation has taken place so far. We also believe that Wess or Wyle Lab, have claims against the consultant that conducted the Phase I report in 1994 since they did not recommend additional testing as a result of their findings before the transaction was made. Such claims would limit or exclude E.ON's liability.

2. Norco

At the meeting in New York Kennedy/Jenks stated that the maximum costs for a clean-up of the Norco site for future industrial use would not exceed an amount of 1.5 million USD. We are therefore surprised that Arrow offered an amount of REDACTED and might be even inclined to increase this amount. E.ON believes that the amount of 1.5 million USD is reasonably calculated based on a long-term strategy. If Sinclair needs to reach a clean-up

standard for different use in a short period of time, they have to bear the additional costs.

Finally, we believe that under no circumstances E.ON would be liable for 100% in accordance with Sect. 7.14 and exhibit 5.8 of the SPA. From the materials disclosed so far to us, we conclude that the matter in question is not about hydraulic oil as described in exhibit 5.8 of the SPA.

3. Huntsville

A representation by E.ON that the indemnification provisions had been triggered has never been made. In addition to our general objections described in this letter under Section 1, E.ON questioned the involvement of Kennedy/Jenks which has lead to higher investigation costs. You stated that you want to control the process. E.ON is prepared to accept this if Arrow in return is prepared to bear the additional costs caused by the involvement of Kennedy/Jenks.

4. Next Steps

We should appreciate if you can clarify the open points because we see this as the basis for any future discussions or any payments by E.ON. In any case, we are ready to ask our environmental consultants to further analyse the clean-up costs for the Norco site and support their current cost estimate if this is helpful for you in your discussions with Sinclair. Also, we do not object if Arrow resumes work and

interaction with the necessary regulatory agencies at both sites.

Yours sincerely,
E.ON AG

/s/ I.V. H. Schmitz
Harry Schmitz

/s/ Dr. Fischer
Dr. Frank Fischer

[LOGO]

[Names, Addresses And
Phone Numbers Omitted In Printing]

via courier and via fax: 001 - 631 - 847 54 58

Mr. Wayne Brody
Vice President Legal Affairs
Arrow Electronics, Inc.
50 Marcus Drive
Melville

USA – NY 11747-4210

May 28, 2003

Norco

Dear Mr. Brody:

Thank you very much for all the documents you have sent us in the last couple of days to keep us informed about the developments regarding the Norco site.

Obviously, you have managed to bring down Wyle to more reasonable numbers. We understand that Arrow has an agreement with Wyle on how to move on with the investigation in and the remediation of the site. This seems to be an important step for the two parties in light of the increasing public attention.

However, we feel that the agreement does not properly reflect the environmental responsibility under the 1994 Asset Purchase Agreement. For example, E.ON's main concern is that the Work Plan which is the basis of Arrow's agreement with Wyle has been prepared to complete remediation of the site for residential use and goes thereby far beyond the scope

which would be necessary for further industrial use. This misapprehension can be demonstrated with various examples taken from the Work Plan:

1. The purpose expressed in the Work Plan is to "Obtain maximum benefit from planned site re-development". This is clearly not within the scope of indemnifications to be provided to Wyle.

2. The urgency and scope of Work Plan is expressed in the stated goal to "Ready" the affected portion of the site for redevelopment within a 12 to 24 month period". This is not an urgency that was anticipated and agreed upon in 1994 nor is the urgency one that will result in any cost savings, but, to the opposite, in more regulatory scrutiny and more cost.

3. The Work Plan focuses on coordination of investigation/remediation activities with the planned construction activities for the site. While this is the appropriate way to proceed given the site building and structures will be removed for the new homes that will be built, our concern is that areas of contamination could be discovered (once buildings are removed) which previously could have naturally degraded over time and this in turn will increase the overall remediation costs:

4. Baseline Health Risk Assessment (HRA) of the Environ Work Plan indicates that risk-based cleanup levels (RBCLs) will be established for the site based on a residential use. It is stated in Task 2 "Through the HRA, Environ will develop the RBCLs for the contaminated soil and ground

water at the site and residential exposure scenario will be used in the HRA evaluation."

5. Soil Remediation of the Environ Work Plan indicates the developer's grading plan will be reviewed and Environ will observe grading activities while implementing the hot spot removal. The activity of "grading" the site is associated with the residential development and again exceeds the contractual obligations.

We hope that you understand that, against this background, E.ON cannot support your agreement with Wyle. Furthermore, we deem it important to point out, that Arrow has so far not responded to E.ON's general concerns listed in our letter dated March 4, 2003.

REDACTED

Kind regards,

E.ON AG

/s/ Dr. Rolf Pohlig
(Dr. Rolf Pohlig)

/s/ Dr. Fischer
(Dr. Frank Fischer)

[Final Act of the Twentieth Session]

CONVENTION ON CHOICE OF COURT AGREEMENTS (Concluded 30 June 2005)

The States Parties to the present Convention,

Desiring to promote international trade and investment through enhanced judicial co-operation,

Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,

Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude this Convention and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1 Scope

1. This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.

2. For the purposes of Chapter II, a case is international unless the parties are resident in the same

Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.

3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2 Exclusions from scope

1. This Convention shall not apply to exclusive choice of court agreements –

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;

b) relating to contracts of employment, including collective agreements.

2. This Convention shall not apply to the following matters –

a) the status and legal capacity of natural persons;

b) maintenance obligations;

c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;

d) wills and succession;

e) insolvency, composition and analogous matters;

f) the carriage of passengers and goods;

g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

h) anti-trust (competition) matters;

i) liability for nuclear damage;

j) claims for personal injury brought by or on behalf of natural persons;

k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;

l) rights in rem in immovable property, and tenancies of immovable property;

m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;

n) the validity of intellectual property rights other than copyright and related rights;

o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;

p) the validity of entries in public registers.

3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object

of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.

4. This Convention shall not apply to arbitration and related proceedings.

5. Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.

6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3 Exclusive choice of court agreements

For the purposes of this Convention –

a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented –

i) in writing; or

ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4 Other definitions

1. In this Convention, "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State –

a) where it has its statutory seat;

b) under whose law it was incorporated or formed;

c) where it has its central administration; or

d) where it has its principal place of business.

CHAPTER II – JURISDICTION

Article 5 Jurisdiction of the chosen court

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

3. The preceding paragraphs shall not affect rules –

a) on jurisdiction related to subject matter or to the value of the claim;

b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer

a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

e) the chosen court has decided not to hear the case.

Article 7 Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a

party may request or a court should grant, refuse or terminate such measures.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 8 Recognition and enforcement

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

5. This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9 Refusal of recognition or enforcement

Recognition or enforcement may be refused if –

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

b) a party lacked the capacity to conclude the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10 Preliminary questions

1. Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was

based on a ruling on a matter excluded under Article 2, paragraph 2.

3. However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –

a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or

b) proceedings concerning the validity of the intellectual property right are pending in that State.

4. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21.

Article 11 Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2. The court addressed shall take into account whether and to what extent the damages awarded by

the court of origin serve to cover costs and expenses relating to the proceedings.

Article 12 Judicial settlements (transactions judiciaires)

Judicial settlements (transactions judiciaires) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 13 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –

a) a complete and certified copy of the judgment;

b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;

c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.

3. An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15 Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

CHAPTER IV – GENERAL CLAUSES

Article 16 Transitional provisions

1. This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.

2. This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article 17 Contracts of insurance and reinsurance

1. Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.

2. Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of –

a) a matter to which this Convention does not apply; or

b) an award of damages to which Article 11 might apply.

Article 18 No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

Article 19 Declarations limiting jurisdiction

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

Article 20 Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21 Declarations with respect to specific matters

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply –

a) in the Contracting State that made the declaration;

b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22 Reciprocal declarations on non-exclusive choice of court agreements

1. A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts

of one or more Contracting States (a non-exclusive choice of court agreement).

2. Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if –

a) the court of origin was designated in a non-exclusive choice of court agreement;

b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and

c) the court of origin was the court first seised.

Article 23 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 24 Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

a) review of the operation of this Convention, including any declarations; and

b) consideration of whether any amendments to this Convention are desirable.

Article 25 Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;

c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 26 Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

3. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention

entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

4. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

5. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

6. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER V – FINAL CLAUSES

Article 27 Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28 Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend

to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 29 Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation

shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.

4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30 Accession by a Regional Economic Integration Organisation without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a

"Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31 Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.

2. Thereafter this Convention shall enter into force –

a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32 Declarations

1. Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time

thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

5. A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33 Denunciation

1. This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon

the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34 Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following –

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;

b) the date on which this Convention enters into force in accordance with Article 31;

c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;

d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private

International Law as of the date of its Twentieth Session and to each State which participated in that Session.

Annex to the Convention: recommended form